90-131

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

COLUMBIA GAS TRANSMISSION CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

QUESTION PRESENTED

In this case, the Federal Energy Regulatory Commission found "good cause" to waive the notice requirement in Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), and permitted natural gas pipelines to pass through to downstream customers, based on their past purchases of gas, various costs that the pipelines themselves had been required to pay producers for their purchase of the same gas.

The question presented is:

Whether notwithstanding the Commission's waiver, the Commission's approval of this direct billing of customers for past sales constitutes impermissible retroactive ratemaking.

PARTIES TO THE PROCEEDINGS

In addition to the Federal Energy Regulatory Commission, the parties in the court of appeals were:

Atlanta Gas Light Company
CNG Transmission Corporation
Columbia Gas Transmission Corporation
General Service Customer Group and Panhandle Customer Group
Indiana Gas Company
Kansas Power & Light Company
Michigan Consolidated Gas Company
Municipal Defense Group
Panhandle Eastern Pipe Line Company
Philadelphia Electric Company
Philadelphia Gas Works
Process Gas Consumers Group
Public Service Electric and Gas Company
Texas Gas Transmission Corporation
Transcontinental Gas Pipe Line Company
Trunkline Gas Company
UGI Corporation
Washington Gas Light Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Energy Regulatory Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (89-2001 Pet. App. 1a-14a)[1] is reported at 895 F.2d 791. The court's prior opinion (Pet. App. 42a-56a) and order denying rehearing (Pet. App. 57a-59a) are reported at 831 F.2d 1135 and 844 F.2d 879. The orders of

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[1] "89-2001 Pet. App." [hereinafter "Pet. App."] refers to the appendix to the petition for a writ of certiorari in *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990), which seeks review of the same judgment of the court of appeals.

the Federal Energy Regulatory Commission (Pet. App. 17a-41a) are reported at 45 F.E.R.C. ¶ 61,169, 46 F.E.R.C. ¶ 61,066, 44 F.E.R.C. ¶ 61,173, and 44 F.E.R.C. ¶ 61,418.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990, and a petition for rehearing was denied on April 19, 1990. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 4 and 5(a) of the Natural Gas Act, 15 U.S.C. 717c and 717d(a), are reproduced at App., *infra*, 2a-5a.

STATEMENT

This case involves the validity of orders of the Federal Energy Regulatory Commission permitting natural gas pipelines to charge their downstream customers for certain costs that the pipelines were required to pay producers for past sales of gas. The Commission's orders found "good cause" for waiving the notice requirements in Section 4(d) of the Natural Gas Act (NGA), 15 U.S.C. 717c(d), and permitted the pipelines to bill those costs directly to their downstream customers based on the customers' past purchases. Notwithstanding the Commission's waiver, the court of appeals held that such direct billing constitutes impermissible retroactive ratemaking, in violation of the "filed rate doctrine." This case therefore presents issues similar to those presented in *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016 (filed June 22,

1990), in which we seek review of another D.C. Circuit decision holding that a Commission order impermissibly permitted a retroactive rate increase, in violation of the filed rate doctrine. We accordingly suggest that the instant petition be held and disposed of in light of *FERC* v. *Associated Gas Distributors.*

A. Statutory and Regulatory Background

1. Title I of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, established ceiling prices for "first sales" (typically wellhead sales by producers) of most categories of natural gas. Section 110(a) of the NGPA authorizes producers to charge above the NGPA ceiling price to the extent necessary to recover certain "production-related" costs that they incur after the gas has been brought to the wellhead—specifically, "[a]ny costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission." 15 U.S.C. 3320(a). Section 601 of the NGPA, 15 U.S.C. 3431, assures pipelines that they will be permitted to pass through to their downstream customers these and other costs they pay producers for gas. It provides that "any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if * * * such amount does not exceed the maximum lawful price," and "[t]he Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas * * * [that is] deemed to be just and reasonable." 15 U.S.C. 3431(b)(1)(A) and (c)(2)(A).

2. Upon enactment of the NGPA in 1978, the Commission issued interim regulations allowing first

sellers to apply for recovery of certain production-related costs. 43 Fed. Reg. 56,448, 56,575-56,577 (1978). On July 25, 1980, the Commission issued Order No. 94, 45 Fed. Reg. 53,099, which liberalized recovery of certain production-related costs but imposed a moratorium on applications to recover costs of gathering and compressing gas, pending completion of rulemaking proceedings to fix the allowable charge for those costs on a generic basis. The Commission found the generic approach necessary because case-by-case assessment of gathering and compression costs would be administratively unworkable. *Id.* at 53,107-53,108. However, the Commission assured sellers that "a retroactive collection procedure will be provided under which the allowance for compression costs determined under the generic rulemaking will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule if collection of such costs is contractually authorized." *Id.* at 53,107. The Commission likewise stated that "a retroactive collection procedure will be provided" for gathering costs. *Id.* at 53,108. See Pet. App. 3a-4a, 18a n.4, 46a-47a.

3. On March 7, 1983, the Commission prescribed allowances for gathering and compression costs (48 Fed. Reg. 5180 (1983); 18 C.F.R. 1104(d)(1)) and issued Order No. 94-A, which permitted producers to collect those costs on a retroactive basis from the pipelines that were their customers during the 1980-1983 period. 48 Fed. Reg. 5152 (1983); 18 C.F.R. 271.1104(e).[2] Many pipelines sought judicial review

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[2] In Order No. 94-B, 48 Fed. Reg. 5190 (1983), the Commission allowed recovery of certain production-related costs by sellers of gas under intrastate contracts covered by Sections 105 and 106(b) of the NGPA, 15 U.S.C. 3315, 3316(b).

of Orders Nos. 94 and 94-A in the United States Court of Appeals for the Fifth Circuit, which sustained the Orders in relevant part in *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (1985), cert. denied, 476 U.S. 1114 (1986). The Fifth Circuit found that the retroactive collection procedure was based on "a fair balancing of the various problems involved: the sellers' need for allowances, the purchasers' need for notice, and the Commission's need to make a thorough study prior to setting allowances." 769 F.2d at 1066.

B. The Proceedings In This Case

1. After (and, in one instance, prior to) the Fifth Circuit's decision in *Texas Eastern*, producers began to collect the past costs from the pipelines with which they had contracts. Some pipelines in turn began to recover those costs from their downstream customers through "Purchased Gas Adjustment" (PGA) accounts. See 18 C.F.R. 154.301-154.311.[3] Although the costs had been incurred for past deliveries, the PGA approach required that they be collected prospectively as part of the price of gas the pipelines sold in 1985 and later. Pet. App. 4a, 19a & n.5.

The PGA approach, however, presented significant problems, because many pipelines no longer sold the

[3] Under the PGA mechanism, a pipeline projects gas costs for the upcoming six-month period. At the end of each such period, the pipeline determines the difference between what it paid and what it received for gas and then adds or subtracts that difference to the price charged for gas sold in the next six months. The PGA mechanism allows pipelines to charge a commodity rate that reflects a current estimate of the future cost of gas, modified by a surcharge for previous under- or over-collections. See, *e.g.*, *El Paso Natural Gas Co.* v. *FERC*, 677 F.2d 22, 23 (5th Cir. 1982).

same volumes of gas—or no longer sold to the same customers in the same proportions—as they had between 1980 and 1983. These changes were largely due to the Commission's intervening issuance of Order No. 436 in 1985 (FERC Stats. & Regs., Regulation Preambles ¶ 30,665), which "envisage[d] a complete restructuring of the natural gas industry" by changing the principal role of pipelines from merchants that purchased gas from producers and resold it to downstream customers, to transporters of gas that was bought and sold by others. *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (*AGD I*). Under Order No. 436 and related measures, many previously "captive" customers of pipelines were able to purchase gas from others and still use their former pipeline suppliers for transportation.[4] As a result, the PGA passthrough approach would not necessarily allow pipelines to recover gathering and compression costs from the customers on whose behalf those costs had been incurred between 1980 and 1983. Moreover, if the pipelines added these past costs to their current sales rates, the higher rates would send erroneous market signals and cause even more downstream customers to purchase gas elsewhere. Pet. App. 64a-66a.

In response to this new market and regulatory climate, five pipelines that had been billed a total of more than $500 million for the past gathering and compression costs incurred by producers petitioned the Commission to allow recovery of those costs by "di-

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[4] We describe the relevant regulatory and market changes in greater detail in our certiorari petition (at 4-9) in *FERC* v. *Associated Gas Distributors*, No. 89-2016.

rect billing" of their downstream customers.[5] Under that approach, the pipelines would allocate the payments they made to each producer among their customers in proportion to the customers' actual purchases of that producer's gas during the prior period. Pet. App. 4a-5a, 19a, 48a-49a. In a series of orders issued in 1985 and 1986, the Commission granted the pipelines' applications. *Id.* at 60a-142a.

2. On judicial review at the behest of a number of downstream customers, the D.C. Circuit set aside the Commission's orders approving the pipelines' "direct billing" applications. Pet. App. 42a-56a (*Columbia I*). The court held that the orders amounted to retroactive ratemaking, in violation of the "filed rate doctrine," because "downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they already purchased." *Id.* at 51a. The court concluded that while this "prohibition [against retroactive rate increases] might have been overridden through adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date," Order No. 94 was "addressed exclusively to *first sales* of natural gas" and therefore "cannot be deemed to have placed downstream purchasers on notice that they in turn would be expected to absorb these costs through a system of surcharges collected after the fact." *Ibid.*

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[5] The costs billed to the pipelines were approximately $163 million for Transcontinental Gas Pipe Line Corporation (Transco), $136 million for Texas Eastern Transmission Corporation, $105 million for Trunkline Gas Company, $95 million for Texas Gas Transmission Corporation, and $20 million for Panhandle Eastern Pipe Line Company (Panhandle).

The court made clear on rehearing that the Commission was free on remand to consider whether it had the authority to approve the pipelines' direct billing applications by waiving the notice requirement under Section 4(d) of the NGA, 15 U.S.C. 717c(d). Section 4(d) provides that "[u]nless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate * * * except after thirty days' notice to the Commission and the public," and that "[t]he Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for."

3. On remand, the Commission found that the pipelines' applications satisfied the "good cause" standard in Section 4(d). It therefore waived the notice requirement in Section 4(d) and permitted the pipelines to place the rate increase in effect as of 1980 and to recover the increase by directly billing their customers that purchased gas during the 1980-1983 period. Pet. App. 17a-26a. The Commission acknowledged that prior waivers permitting a rate change to be given effect as of a date prior to the filing of the rate change with the Commission had been granted to "implement[] the parties' intention as expressed in their private contracts." *Id.* at 24a. But the Commission concluded that "good cause" for a waiver may also be found where, as here, it arises "in the context of the overriding public interest in orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which would thereby result." *Ibid.* The Commission explained (*id.* at 22a-23a):

> Under these [direct billing] procedures, pricing signals are not distorted by the influx of sub-

stantial retroactive Order No. 94-A costs. Furthermore, these procedures equitably bill customers for the higher amounts they should have paid for gas based on actual purchases during the past billing periods and more accurately allow the true cost of current gas supplies to be reflected in the pipelines' PGAs. * * *

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[A]bsent waiver, many of those customers who used the gas during the 1980 to 1983 period will not pay these compression and gathering costs. Instead, current customers will pay these costs for those former customers. Equity and the public interest demand that these costs be both recovered by the pipelines and fairly allocated by the pipelines to those who benefitted from the activities by which the costs were incurred.

The Commission further observed that many downstream customers, like respondent Columbia Gas Transmission Corporation, were "fully cognizant" from their own participation in proceedings on Order No. 94 that "they were not paying the full cost of the gas volumes they in turn purchased from the pipelines." *Id.* at 24a-25a.

4. The D.C. Circuit set aside the Commission's order. Pet. App. 1a-14a.[6] The court acknowledged

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[6] In the consolidated proceedings below, the court of appeals also set aside a separate Commission order authorizing Panhandle to direct bill its customers for $17 million in certain other production-related costs that had been allowed by Orders Nos. 473 and 473-A (FERC Stats. & Regs., Regulation Preambles ¶¶ 30,747, 30,788 (1987)) and paid by Panhandle to a producer on a retroactive basis. Pet. App. 7a-8a, 14a, 33a-40a. Orders Nos. 473 and 473-A were recently affirmed in part and reversed in part in *Phillips Petroleum Co.* v. *FERC*, 902 F.2d 795 (10th Cir. 1990).

that "[t]he Commission may well be correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of $1.5 billion in prior production costs to current sales." *Id.* at 13a. The court also acknowledged that in *City of Piqua* v. *FERC*, 610 F.2d 950 (1979), it had sustained a Commission waiver that permitted a rate increase to take effect as of a date prior to the filing of the rate change with the Commission, and that the Fifth Circuit had ordered the Commission to grant a similar waiver. Pet. App. 11a, citing *Hall* v. *FERC*, 691 F.2d 1184 (5th Cir. 1982), cert. denied, 464 U.S. 822 (1983). And, finally, the court did not question the authority of the Commission in this case to waive the *statutory* notice requirement in Section 4(d) to the extent necessary to allow the rate change to be given effect as of 1980. But it nevertheless held that the Commission's order approving the direct billing mechanism was invalid because the Commission failed to comply with what the court found to be an additional, non-statutory notice requirement that it derived from its first decision in this case, *Columbia I*.

In the court of appeals' view, "th[e] statutory notice [required by Section 4(d)], which the Commission may waive on a showing of good cause, is not the notice of prospective rate adjustments to which [the court] referred in *Columbia I* when [it] stated that the NGA's prohibition against retroactive rate increases might have been overridden if FERC had provided 'adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date.'" Pet. App. 10a, quoting *id.* at 51a. "That statement," the court continued, "was addressed to those circumstances in which the Commission has authorized increases in prices previ-

ously paid by purchasers who were already on notice that the prices they were paying were provisional only." *Id.* at 10a-11a.

The court distinguished its prior decision in *City of Piqua* on this basis. There, an electric utility and a town had agreed to a higher rate, but the utility's filing of the rate change with the Commission was delayed pending approval of the new contract by the city council.[7] *City of Piqua* sustained the Commission's waiver of the statutory notice requirement to allow the rate change to become effective on the date specified in the contract, which was prior to the date of the utility's filing. 610 F.2d at 952-954. It also rejected the city's objection that the effect of the order was to allow retroactive ratemaking, reasoning that the rate change "was prospective from the date of the contract." 610 F.2d at 954. The court similarly distinguished the Fifth Circuit's decision in *Hall* v. *FERC* on the ground that it gave effect to the contract between the parties. See Pet. App. 11a.

Here, the court reasoned, there was no "pre-existing agreement[] between the parties and the notice that went automatically with [it]," nor had "the Commission itself place[d] parties on notice (as it did the first sellers and first buyers of natural gas in Order No. 94) that the rates they [were to] be paying [would] subject to retroactive adjustment at a later date." Pet. App. 12a-13a. In the court's view,

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[7] *City of Piqua* arose under Section 205(d) of the Federal Power Act (FPA), 16 U.S.C. 824d(d), which requires 60-days' notice. But as *City of Piqua* recognized, 610 F.2d at 953 n.10, because the relevant provisions of the two Acts are otherwise "substantially identical," decisions arising under those provisions of the two Acts may be cited interchangeably. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

the absence of such notice meant that the rates were retroactive and could not be allowed.

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated orders of the Federal Energy Regulatory Commission that allocated in an equitable manner more than $500 million in costs incurred by producers in gathering and compressing gas during a time when the Commission had imposed a temporary moratorium on applications to recover such costs. The Commission made clear when it imposed the moratorium in July 1980 that producers would be permitted to recover those costs from pipelines on a retroactive basis, upon completion of rulemaking proceedings to establish the appropriate rates on a generic basis. The Commission's orders in this case allow the pipelines to allocate the past costs among the downstream customers on whose behalf they were incurred while the rulemaking was pending. The pipelines' downstream customers had no reasonable expectation in 1980 that they would be able to avoid ultimate responsibility for those costs. The Commission's approval of direct billing is consistent with the customers' expectations, taking into account the substantial intervening changes in the regulatory regime and the natural gas market.

By contrast, the court of appeals' decision setting aside the Commission's orders will require the pipelines to attempt to charge the past costs to their future customers, thereby creating substantial inequities and market distortions and departing from the standard ratemaking principle that customers should bear costs incurred for their benefit. Moreover, the higher sales rates will render the pipelines' sales rates less competitive and thus could accelerate their

loss of sales customers. If, for this reason, the pipelines were unable to pass the costs on in their future sales, the costs would be "trapped" with the pipelines (compare *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 970 (1986)), thereby undermining the policy of Section 601 of the NGPA generally permitting pipelines to pass on the costs they incurred in purchasing gas.

The D.C. Circuit nonetheless held that the direct billing mechanism constitutes impermissible retroactive ratemaking, in violation of the "filed rate doctrine." In reaching that conclusion, the court applied essentially the same view of the filed rate doctrine and retroactive ratemaking as it did in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (1989) (*AGD II*). We have filed a petition for a writ of certiorari to review the D.C. Circuit's decision in the *AGD II* case, see *FERC* v. *Associated Gas Distributors*, No. 89-2016 (filed June 22, 1990), and a number of other parties have filed certiorari petitions seeking review in *AGD II* as well.[8] We therefore suggest that the instant petition be held and disposed of as appropriate in light of the Court's disposition of the certiorari petitions filed in *AGD II*.

1. a. Although the statutory text can be read to suggest that the Commission's waiver authority allows it to do no more than shorten or eliminate the 30-day notice period before rates filed with the Commission may take effect, the courts that have consid-

[8] See *Berkshire Gas Co.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1988 (filed June 21, 1990); *Tennessee Small General Service Customer Group* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1989 (filed June 21, 1990); *Tennessee Gas Pipeline Co.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1990 (filed June 21, 1990).

ered the question, including the court below, have uniformly sustained the Commission's authority to grant a waiver under Section 4(d) of the NGA (or Section 205(d) of the FPA) that permits a rate increase to be given an effective date prior to when the increase was filed with the Commission. See *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979); *Hall* v. *FERC*, 691 F.2d 1184 (5th Cir. 1982), cert. denied, 464 U.S. 822 (1983);[9] *Towns of Concord & Wellesley* v. *FERC*, 844 F.2d 891, 896-897 (1st Cir. 1988).[10] Although the waivers in those three cases

[9] Prior to the Fifth Circuit's decision in *Hall* v. *FERC*, this Court had held in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), that a state court could not award damages to the producer for breach of contract based on the pipeline's failure to pay the higher price to which the producer claimed it was entitled under the "most favored nation" clause of the contract as a result of the pipeline's purchases at a higher price from another producer. The Court held that such a damage award would violate the filed-rate doctrine, since the lower rate paid by the pipeline was on file with the Commission when the sales were made. The Court noted that the producer had requested the Commission to waive the filing requirements of the NGA to permit it to recover a damage award calculated on the basis of the rates it believed should have been in effect for past sales. And the Court observed that "[a]lthough the Commission may not *impose* a retroactive rate alteration," it has the authority under Section 4(d), for good cause shown, to "waive the usual requirement of timely filing of an alteration in a rate." 453 U.S. at 578 n.8. But "[a]ssuming, *arguendo*, that waiver is available for retroactive collection of a higher rate than the one on file," the Court pointed out that at the time of the decision in *Arkansas Louisiana Gas Co.* v. *Hall*, the Commission had denied that waiver request and the denial was pending on judicial review in the Fifth Circuit in *Hall* v. *FERC*. 453 U.S. at 578 n.8; *id.* at 576 n.6.

[10] That was the contemporaneous interpretation by the Federal Power Commission immediately after passage of the

were found to be justified on the ground that they were linked to an agreement between the parties, Section 4(d) of the NGA makes no mention of that factor and thus does not suggest that the existence of an agreement is a necessary condition for the Commission's exercise of its power to grant a waiver. The only condition is "good cause shown."

Accordingly, if (as *City of Piqua*, *Hall* and *Towns of Concord & Wellesley* held) the Commission may grant a waiver of the statutory notice requirement under Section 4(d) to permit a prefiling effective date where there is an agreement between the parties, it follows from the text of Section 4(d) that the Commission has the power to do so in other circumstances as well, where the requisite "good cause" is shown. Moreover, the Court recently reiterated in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (June 21, 1990), that parties cannot by contract defeat the filed rate doctrine (as set forth in the tariff scheme of the Interstate Commerce Act). A logical corollary to that ruling is that a specific agreement is not a necessary condition for waiver of the notice component of the filed rate doctrine (as set forth in Section 4(d) of the NGA). On that premise, the Commission concluded in this case that despite

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FPA in 1935 and the NGA in 1938. See 18 C.F.R. 54.3(e) (1939) (NGA) ("For good cause shown, the Commission may by order provide that any rate schedule [or] charge * * * shall be effective as of a date prior to the date of filing"); 18 C.F.R. 35.3(e) (1939) (FPA) (same). Current FPA regulations expressly allow a pre-filing effective date. 18 C.F.R. 35.11. The parallel provision was deleted from the NGA regulations when they were revised in 1948, 13 Fed. Reg. 6838, albeit without any indication of an intention to eschew that authority under the generally applicable waiver provisions, 18 C.F.R. 154.22 and 154.51.

the absence of an agreement calling for higher rates, considerations of equity and cost-causation constituted "good cause" for granting a waiver under Section 4(d), especially in light of the Commission's own assurances of retroactive recovery and the substantial regulatory changes that intervened.

b. It is important to recognize that the D.C. Circuit in this case did not hold that the Commission's action was prohibited by anything in Section 4(d). To the contrary, the court acknowledged that its prior decision in *City of Piqua* sustained a Section 4(d) waiver permitting a pre-filing effective date. Pet. App. 10a-11a. Rather, the decision below invalidated the direct billing approved by the Commission because the Commission had not given a distinct, *extra-statutory* form of notice to downstream customers in 1980 that they might be billed an additional amount at a later date to cover gathering and compression charges incurred in producing the gas they were then purchasing. That additional notice was necessary, the court held, in order to prevent the subsequent rate increase from being impermissibly "retroactive." The court did not, however, identify the source of the prohibition against retroactive rates that it invoked. Instead, as it did in *AGD II* (see 89-2016 Pet. 13-15, 18-19, 21-25; 89-2016 Pet. App. 6a-11a), the D.C. Circuit treated the "filed rate doctrine" and its presumption against retroactive rates as if they were judicially fashioned principles that can be expanded by the courts in a common-law manner, rather than merely the labels given certain statutory provisions that govern the filing and fixing of rates.

As we explain in our certiorari petition in *AGD II* (at 21), the NGA in fact contains two provisions addressing retroactive rate changes. First, where the

Commission initiates an inquiry into the reasonableness of rates that are already on file, it has the power to "determine the just and reasonable rate * * * to be *thereafter* observed and in force, and shall fix the same by order." 15 U.S.C. 717d(a) (emphasis added). Because of this limitation in Section 5(a), the Commission "may not *impose* a retroactive rate alteration and, in particular, may not order reparations." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. at 578 & n.8. The rate increase in this case, however, was not ordered by the Commission under Section 5(a). It was requested by the pipelines under Section 4.

In contrast to Section 5(a), Section 4 does not state that the Commission may approve only those rate changes filed by a pipeline that are to be "thereafter observed and in force." Rather, the general rule against retroactive rate increases initiated by a natural gas company is contained in Section 4(d)'s provision that unless the Commission otherwise orders, no rate increase filed by a gas company may take effect without 30 days' notice to the Commission and the public. As noted above, the D.C. Circuit and other courts have held that the Commission may exercise its waiver authority under Section 4(d) not simply to shorten the 30 days' notice period, but to permit a rate change to be given an effective date prior to when it was filed with the Commission. See page 14, *supra*. Under this construction, where, as here, the Commission finds good cause to exercise its waiver authority in Section 4(d) to permit a prefiling effective date, the only bar in Section 4—and therefore the only bar anywhere in the NGA—to a retroactive rate increase initiated by a pipeline is lifted.

The D.C. Circuit, by contrast, was of the view in the decision below and its prior decision in this case (*Columbia I*) that the NGA's prohibition against retroactive rates exists independently of Section 4(d), and it then fashioned its extra-statutory notice requirement to enforce that unanchored prohibition. Pet. App. 10a-15a, 52a-53a. The court was thus led far astray. It seemed to believe that if the downstream customers had been given adequate notice in 1980, a subsequent rate increase by the pipelines (by means of direct billing) would not have been retroactive at all. But that is not true: the increase would have been retrospective in at least one respect that seems especially relevant for purposes of the filed rate doctrine, because it still would have applied to sales made prior to the date the rate change was filed with the Commission. For this reason, contrary to the D.C. Circuit's view in the decision below and *Columbia I*, the relevant question here is not whether the downstream customers had sufficient notice (of a sort not mentioned anywhere in the NGA) that the rates they were paying between 1980 and 1983 might later be adjusted. The question is whether anything in Section 4(d) of the NGA precludes the Commission's action. As noted, the D.C. Circuit did not rest its decision on any finding that the Commission lacked "good cause" under Section 4(d) or that Section 4(d) absolutely prohibited making rates effective prior to the filing date.

2. Although the decision below is of substantial practical importance and rests on a fundamentally mistaken view of the filed rate doctrine, we do not urge the Court to grant plenary review. The D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II*. There, the court likewise treated the filed rate doctrine and its

retroactivity component as if they were judicially fashioned rules that could be further shaped by the courts according to their own perception of the rules' underlying purposes, divorced from the text and purposes of the NGA. Indeed, in *AGD II*, the D.C. Circuit relied extensively on its first decision in the instant case (*Columbia I*) in articulating its vision of the filed rate doctrine and the extra-statutory notice requirement, upon which it then relied in invalidating the Commission's order allocating take-or-pay costs among downstream customers. See 89-2016 Pet. App. 6a-11a. *AGD II* and the instant case also are closely related in practical terms, because both involve the allocation of costs by pipelines in the wake of the massive restructuring of the natural gas market that has occurred over the past decade as a result of Acts of Congress, administrative measures, and economic forces.

If, as we urge, the Court grants certiorari in *AGD II* and reverses the D.C. Circuit's decision in that case on the ground that it was not rooted in the text of the specific provisions of the NGA (including Section 4(d)) that comprise the "filed rate doctrine," that disposition will further highlight the essentially identical errors by the D.C. Circuit in this case. If the Court then vacates the judgment below in this case and remands for further consideration in light of *AGD II*, it will be clear to the D.C. Circuit on remand that the NGA's only prohibition against retroactive rates in a case such as this is contained in Section 4(d). Under that court's precedent in *City of Piqua*, sustaining the Commission's authority in appropriate circumstances to permit a rate increase to take effect prior to when it was filed by granting a waiver under Section 4(d), the D.C. Circuit then would be required to review the Commission's deter-

mination that there was "good cause shown" for such a waiver in this case.

For the foregoing reasons, *AGD II* will shed considerable light on the appropriate disposition of this case. We therefore suggest that the instant petition for a writ of certiorari be held and disposed of as appropriate in light of the Court's disposition of the petitions filed by the Commission and others parties in the *AGD II* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition for a writ of certiorari in *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016, and the other certiorari petitions seeking review of the judgment of the District of Columbia Circuit in that case (see note 8, *supra*).[11]

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

WILLIAM S. SCHERMAN
General Counsel
Federal Energy Regulatory Commission

JULY 1990

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[11] For the same reason, the certiorari petition filed by the pipelines seeking review of the D.C. Circuit's decision in the instant case, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001, should also be held and disposed of as appropriate in light of *FERC* v. *Associated Gas Distributors*, No. 89-2016, and related cases.

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1701

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

AND CONSOLIDATED CASES

[Filed Apr. 19, 1990]

ORDER

Before: BUCKLEY, D.H. GINSBURG and SENTELLE, Circuit Judges.

Upon consideration of the Petition for Rehearing of the intervenor pipelines, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam

For the Court:

CONSTANCE L. DUPRE, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX B

STATUTORY PROVISION INVOLVED

1. Section 4 of the Natural Gas of 1938, 15 U.S.C. 717c, provides:

Rates and Charges

(a) **Just and reasonable rates and charges**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) **Undue preferences and unreasonable rates and charges prohibited**

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) **Filing of rates and charges with Commission; public inspection of schedules**

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such

form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) **Changes in rates and charges; notice to Commission**

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) **Authority of Commission to hold hearings concerning new schedule of rates**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, with-

tion of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas out answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expira-

company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

2. Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), provides:

Fixing rates and charges; determination of cost of production or transportation

Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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(2)

No. 90-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

CHARLES F. WHEATLEY, JR.
Counsel of Record
PHILIP B. MALTER
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(301) 266-7524

Attorneys for The Municipal Defense Group

August 31, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the decision of the court below precluding retroactive ratemaking by natural gas pipeline companies regulated under the Natural Gas Act, should be reviewed, where the court followed the plain meaning of the statute and precedents of both this Court and the circuit courts of appeal to reach a result consistent with the basic congressional objective to protect gas consumers.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

The Respondent, Municipal Defense Group ("MDG") is an *ad hoc* group of ten small municipal publicly-owned gas systems which, during the time period at issue here, purchased all their gas supply from Panhandle Eastern Pipe Line Company. The rates and charges of Panhandle Eastern Pipe Line Company to MDG were increased, pursuant to the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission"), which orders were reversed and re-

manded by the decision of the United States Court of Appeals for the District of Columbia Circuit below.[1]

COUNTERSTATEMENT

At page 3 of its Petition for Writ of *Certiorari*, the Commission alleges that Section 601 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. § 3431, guaranteed the pipelines the passthrough of all Section 110, 15 U.S.C. § 3320, costs allowed by the Commission. However, as MDG discussed at MDG Br. 6-7, it was unrebutted below that Section 601 does not apply to retroactive rates.

At 10, the Commission alleges that the court below "did not question the authority of the Commission in this case to waive the *statutory* notice requirement in Section 4(d) to the extent necessary to allow the

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[1] On June 22, 1990, Panhandle Eastern Pipe Line Company, *et al.* also filed a petition for writ of *certiorari* to the United States Court of Appeals for the D.C. Circuit in No. 89-2001 regarding the same D.C. Circuit opinion which is the subject of the current petition. On or about July 2, 1990, one of the respondents, Columbia Gas Transmission Corporation requested an extension of time to file responses to all the petitions for writs of *certiorari* regarding the D.C. Circuit decision below. This request was not served on parties, such as MDG. Soon thereafter, the Clerk of the Supreme Court granted Columbia Gas' request for an extension of time. However, MDG's copy of the this grant was apparently lost in the mail and never received by MDG. Accordingly, MDG filed its response in opposition to Panhandle Eastern Pipe Line Company, *et al.*'s petition in No. 89-2001 on July 25, 1990. References herein to MDG's brief in opposition to the petition in No. 89-2001, filed on July 25, 1990, are designated "MDG Br." References to the appendix attached to MDG's brief are designated "MDG App." References to the appendix of the petitioners in No. 89-2001 are designated "Pet. App."

rate change to be given effect as of 1980." However, this is a misstatement. In the decision below, Pet. App. at 9a, the court said:

> We conclude that while the Commission has considerable latitude to waive the notice requirement under Section 4(d), its powers do not encompass what it claims in this case.

The court explained that the only situation where the Commission's Section 4(d) [of the Natural Gas Act ("NGA"), 15 U.S.C. § 717c(d)] waiver power could extend backward, past the original filing date, would be where the rate increase was not retroactive, but prospective from a previous effective date as contemplated by a contract between the parties. And, inasmuch as there was no such contract between the parties in the instant case, the lower court rejected the Commission's view that it had authority to waive the statutory notice requirement of Section 4(d) to make these increased rates effective as of 1980.

RESPONSE TO ALLEGED REASONS FOR GRANTING THE PETITION

The Commission commences its alleged reasons for granting the petition with a discussion of the Commission's "moratorium" "imposed" in July, 1980 which allegedly prevented producers from collecting NGPA Section 110 costs on an interim basis. At 12, the Commission further states:

> The pipelines' downstream customers had no reasonable expectation in 1980 that they would be able to avoid ultimate responsibility for these costs. The Commission's approval

> of direct billing is consistent with the customers' expectations . . . .

However, as discussed in MDG's Br. at 4, the Commission did not impose a "moratorium" on the producers, because no right to collect Section 110 costs prior to their determination by the Commission is mandated, or even suggested, by the NGPA. Moreover, MDG had no expectations or knowledge in 1980 that these Section 110 costs even existed because MDG did not receive notice, either *de facto* or *de jure*, of the proposal to charge MDG any Section 110 costs until many years after 1980. MDG Br. at 24-25.

Additionally, at 12-13, the Commission argues:

> By contrast, the court of appeals' decision setting aside the Commission's orders will require the pipelines to attempt to charge the past costs to their future customers, thereby creating substantial inequities and market distortions and departing from the standard ratemaking principle that customers should bear costs incurred for their benefit. Moreover, the higher sales rates will render the pipelines' sales rates less competitive and thus could accelerate their loss of sales customers. If, for this reason, the pipelines were unable to pass the costs on in their future sales, the costs would be "trapped" with the pipelines (compare *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986)), thereby undermining the policy of Section 601 of the NGPA generally permitting pipelines to pass on the costs they incurred in purchasing gas.

However, nothing in the decision below suggests that it would be appropriate for the Commission to permit the pipelines to charge these retroactive costs to their future customers. The Commission's argument also ignores the fact that neither it nor any other party challenged MDG's showing that while the Commission had the power to "untrap" these costs, it had no authorization pursuant to law or equity to charge these costs to consumers, present or future. MDG Br. at 2-3, 6-8, 27 n.14, MDG App. at 1a-8a.

A. The Commission's *Post Hoc* Rationalizations Contradict The Decisions Of This Court, Those Of The Courts Of Appeal, Those Relied Upon By The Commission Below, And The Commission's Contemporaneous Argument In Other Proceedings Before This Court

The gravamen of the Commission's petition is that when a utility files a rate increase pursuant to NGA Section 4, the prohibition against retroactive rate increases contained in Section 5, 15 U.S.C. § 717d does not come into play at all. Thus, according to the Commission, Sections 4 and 5 are to be read independently of each other and only Section 4, not Section 5, can be applied to a utility's rate increase filing. Commission Petition at 16-18.

As this Court has noted:

> [T]he Court "cannot 'accept appellate counsel's post hoc rationalizations for agency action; for an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' "

FPC v. Texaco, 417 U.S. 380, 397 (1974), *quoting Burlington Truck Lines v. United States*, 371 U.S.

156, 168-169 (1962); *see also, Motor Vehicle Manufacturers Assn. v. State Farm Mutual Insurance*, 463 U.S. 29, 43 (1983).

In a similar vein, this Court has refused to consider arguments not first tendered to the lower court. *Moragne v. State Marine Lines*, 398 U.S. 375, 378 n.1 (1970); *Giordenello v. United States*, 357 U.S. 480, 488 (1958); *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957); *see also, Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-310 (1974).

The Commission's Section 4 argument violates the above cited law to an egregious extreme. Notwithstanding that this proceeding has been before the D.C. Circuit for briefing and oral argument twice; notwithstanding that the Commission has issued a number of orders and decisions which were subject to the appellate reviews at issue here; notwithstanding that the Commission has filed another petition seeking a writ of *certiorari* to the D.C. Circuit regarding *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989) ["*AGD II*"] (which petition the Commission views as subsuming the instant proceeding), the Commission has never advanced this position before. Moreover, the Commission cites no case law in support of this position and the position is wholly inconsistent with those previously taken by the Commission and the case law it has previously cited in support of its decisions on appeal.

In one of the orders on appeal to the D.C. Circuit in the proceedings below, Docket No. RP88-203-000, *Panhandle Eastern Pipe Line Company*,[2] the Com-

[2] Pet. App. at 33a-39a.

mission relied chiefly on the precedent of *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979). Pet. App. at 38a, n.8. In that later case, the utility sought an increase under Section 205 of the Federal Power Act, 16 U.S.C. § 824d, the analog of Section 4 of the NGA. Nonetheless, the court found that the applicable law included the prohibitions against retroactive ratemaking contained primarily in Section 206 of the Federal Power Act, 16 U.S.C. § 824e (the analog of Section 5 of the NGA):

> In essence, the rule against retroactivity is "a cardinal principle of ratemaking[:] a utility may not set rates to recoup past losses, nor may the Commission prescribe rates on that principle." . . . If the Commission finds rates or charges unreasonable, it may only substitute reasonable rates "to be thereafter observed and in force . . . ." . . . The retroactive ratemaking rule thus bars utility refunds for past excessive rates, or the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.

610 F.2d at 954 (Citations omitted). The *Piqua* court concluded that the Commission could waive the 30-day notice requirement of Section 205(d) and permit the rate increase to become effective prior to the date it was filed with the Commission *only* because that effective date was contemplated by the contract between the parties and therefore was *not* retroactive: "In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract." *Id.*

Another Commission order on appeal to the D.C. Circuit below, *Transcontinental Gas Pipe Line Corporation, et al.*,[3] relied primarily on the precedent of *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983). This later case citation was also primarily relied upon by the Commission in its briefing and oral argument to the court below. *See, e.g.*, MDG App. at 11a.

In *Hall v. FERC*, the court commenced its discussion of retroactive ratemaking by noting that in the context of a decision cited to it, *Gillring v. FERC*, 566 F.2d 1323 (5th Cir.), *cert. denied*, 439 U.S. 823, *reh'g denied*, 439 U.S. 997 (1978), where a utility sought a retroactive increase in rates that it had on file with the Commission and there was no contract between the parties permitting such retroactive increase, such filing on the part of a utility *would* constitute a prohibited retroactive rate increase. 691 F.2d at 1191; *see also*, *Columbia II*, Pet. App. at 11a. The *Hall* court found:

> The question in the present case—whether the grant of a waiver to permit parties to effectuate their contractual agreement violates a policy against retroactive ratemaking was squarely presented to the United States Court of Appeals for the District of Columbia Circuit in *City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

691 F.2d at 1191. The court finally concluded:

> We agree with the D.C. Circuit Court that the policy against retroactive ratemaking

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[3] Pet. App. at 17a-26a.

> which precludes Commission "substitution of an unreasonably high or low rate with the just and reasonable rate" is "immediately distinguishable" from the present situation where the Commission's waiver gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract."

Id. at 1192. It is thus clear that the precedents previously cited and relied upon by the Commission in both its decisions on appeal below and its argument to the court below were wholly inconsistent with and, indeed, fully contradict its new argument which it tenders to this Court, *i.e.*, that Sections 4 and 5 of the Natural Gas Act are to be read separately, and that Section 5's prohibition against retroactive ratemaking does not apply to any rate increase filing by a utility pursuant to Section 4.

Moreover, according to the Commission's new argument, not only did the court below misapprehend the law, so did this Court in *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 578 (1981), when it said: "The [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold." (In contradiction to the quote above, what the Commission here is alleging is that the Natural Gas Act does not prevent "the Commission itself from imposing a rate increase for gas already sold.").

In addition to the citations above, the list of courts who are also ignorant of the Commission's new-found law would have to include the following: *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 151-

153 (1962); *Public Service Company of New Mexico v. FERC*, 857 F.2d 833 (D.C. Cir. 1988); *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987);[4] *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985); *Public Service Company of New Hampshire v. FERC*, 600 F.2d 944, 957 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979); *Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 686-687 (D.C. Cir. 1978); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 344 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946 (1975); *State Corporation Commission of Kansas v. FPC*, 215 F.2d 176, 183-184 (8th Cir. 1954).

In spite of the above, the Commission cites no case law whatsoever for its new position. The Commission does, however, cite to its "explanation" commencing at page 21 of its *certiorari* petition in *FERC v. Associated Gas Distributors* ("*AGD II*"), No. 89-2016, filed June 21, 1990. Although one could question the relevance of an advocate's citation to his own argument in another case, this particular citation does have particular relevance.

The *AGD II* case at issue in that petition also involved utility filings pursuant to Section 4. Nonethe-

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[4] The *Electrical District* and *Public Service Company of New Mexico* decisions involved electric utilities which filed rates pursuant to Section 206 of the Federal Power Act. However, pursuant to the Commission's argument here, the utilities could have defeated the retroactive ratemaking prohibition of Section 206 by filing a later rate increase pursuant to Section 205, after the Section 206 contracts expired, with a requested waiver of the notice provision and a proposed retroactive effective date sufficiently early so as to render vacuous the court's rulings. *See* MDG Br. at 13-15.

less, commencing at the page 21 cited by the Commission, the Commission completely contradicts the argument made in the instant case, noting: "The prohibition against retroactive ratemaking derives from Sections 4(d) and 5(a) of the NGA." The Commission further acknowledges that the prohibitions of Section 5 would apply to a Section 4 filing if the Commission were imposing a rate increase for gas already sold. The Commission concluded, at page 22, with the explanation that in the *AGD II* case it did not "retroactively substitute a higher rate for the one previously charged by Tennessee for past services, and it did not order Tennessee's customers to pay a higher price for gas they actually purchased during either the base period (1981-1982) or the deficiency period (1983-1986)."

However, in the instant case, the Commission *did* attempt to impose a rate increase on MDG for gas already sold. It *did* order the utilities' customers to pay a higher price for gas they actually purchased during the period 1980 through 1983.

Accordingly, not only is the Commission counsel's *post hoc* rationalization for the Commission's unlawful actions a violation of this Court's prohibition against same and a violation of this Court's prohibition against advancing arguments not raised with the court below, it is in violation of the interpretation of the interrelationship between Sections 4 and 5 and the prohibition against retroactive ratemaking contained in the precedents of this Court, the circuit courts of appeal, the case law citations relied upon by the Commission in its orders below and in its argument to the court below. It is even inconsistent with, and totally contradicted by the Commission's contempor-

aneous argument which it cites to this Court in the Commission's *certiorari* petition in *AGD II*.

B. The Commission's Reading Of Section 4(d) Not Only Violates The Plain Meaning Of The Act, But Would Also Pervert Its Consumer Protection Purposes

At 13-15 the Commission argues that:

> Although the statutory text can be read to suggest that the Commission's waiver authority allows it to do no more than shorten or eliminate the 30-day notice period before rates filed with the Commission may take effect,[5] the courts that have considered the question, including the court below, have uniformly sustained the Commission's authority to grant a waiver under Section 4(d) of the NGA (or Section 205(d) of the FPA) that permits a rate increase to be given an effective date prior to when the increase was filed with the Commission. . . . Although the waivers in those three cases were found to be justified on the ground that they were linked to an agreement between the parties, Section 4(d) of the NGA makes no mention of that factor and thus does not suggest that the existence of an agreement is a necessary condition for the Commission's exercise of its power to grant a waiver. The only condition is "good cause shown."

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[5] MDG submits that the language not only "can be" but *must* be read in that manner. The language employed is that of futurity only. There is no ambiguity and, to read it so as to permit a retroactive increase, would require a violation of the plain meaning of the language employed.

(Citations omitted). However, the Commission advanced the same argument before the lower court and was unable to respond in oral argument to MDG's answer:

> . . . The Commission similarly argues that the NGA permits waiver for "good cause" and nowhere limits good cause to simply effecting the "contractual intent" of the parties. Commission Br. at 31. However, none of the Petitioners here have ever alleged that good cause is limited only to customer consent or contractual intent, but rather only that, consistent with the case law cited previously, a good cause waiver comes into play only where true retroactivity is *not* involved. Thus, the Commission can permit a rate increase to become effective on a 20-day notice, a 10-day notice, or even a zero-day notice, upon a finding of any kind of "good cause." However, if the Commission attempts to make a rate increase effective prior to the date of filing, then it must show, as noted above, either (1) it is not imposing a retroactive rate alteration but simply giving effect to the contractual intent of the parties as to the effective date of a rate or (2) the waiver does not violate the consumer protection purposes of the filed rate doctrine and rule against retroactive ratemaking.

MDG Br. at 16-17.

The court in *Electrical District No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) discussed the primary purpose of the filed rate doctrine and prohibition against retroactive ratemaking:

> [The Act's] primary purpose [is] protecting the utility's customers. *See Town of Alexandria, Minnesota v. FPC*, 555 F.2d 1020, 1028 & n.42 (D.C. Cir. 1977). The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, *cf.*, *Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 344 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 946, 95 S. Ct. 1326, 43 L.Ed.2d 424 (1975), but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L.Ed.2d 856 (1981).

As MDG explained to the lower court, a waiver of the *prospective* 30-day notice requirement can come into play for any kind of "good cause." However, as the case citations relied upon by the Commission fully acknowledged, a Section 4(d) waiver cannot overcome the prohibition against a retroactive rate increase. Thus, a Section 4(d) waiver can only permit rates to become effective prior to the filing date where it does not violate the prohibition against retroactive rate increases.

The Commission's most favored precedent, *Hall v. FERC*, explained why the only two justifications for

a "retroactive" effective date are consumer protection and contractual intent:

> . . . The NGA was drafted to encourage and protect the right of parties to establish rates by individual contract. The Act "evinces no purpose to abrogate private rate contracts as such." *United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338, 76 S. Ct. 373, 378, 100 L.Ed. 373 (1956). In granting Hall's waiver, the Commission could promote the purposes of the Act and preclude Arkla from breaching its contract by delaying Hall's notice filing and using the length of delay to defeat Hall's application. On the other hand, if the Commission took this course but felt compelled to grant a rate increase to Arkla, it would neglect in some respects its duty to protect consumers. The dilemma is one which suggests that the Commission deny any subsequent application for rate increase by Arkla arising from these proceedings. In so doing, the Commission would effectuate [the] dual purposes of the Act. . .

691 F.2d at 1193 n.16.[6]

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[6] The Commission argues that in Maislin Industries U.S. Inc. v. Primary Steel, Inc., 497 U.S. ___, 111 L Ed 2d 94 (1990), the Court ruled that parties may not, by contract, defeat the filed rate doctrine. However, as explained by both petitioners in No. 89-2001 and MDG Br. at 9, the filed rate doctrine applicable to the Interstate Commerce Commission is different from that applicable to the FERC. The ICC can award reparations, whereas the FERC cannot. Moreover, as discussed in *Hall v. FERC* above, the primacy of private rate contracts is one of the dual purposes of the NGA.

In this regard, it is appropriate to note that the essence of the Commission's argument is an attempt to turn the very purposes of the Natural Gas Act on its ear. The NGA was enacted "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Company v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959). Part of the consumer protection built into the NGA was a statutory bias favoring retroactive rate reductions, but not retroactive rate increases:

> It is not insignificant that the Commission acted consistently with the statutory bias favoring retroactive rate reductions but not retroactive rate increases, a bias Congress wrote directly into the statute:
>
> > "[T]he Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or not the lowest reasonable rates."

Belco Petroleum Corp. v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978); *see also*, *Gillring v. FERC*, 566 F.2d 1323, 1325 (5th Cir.) *cert. denied*, 439 U.S. 823, *reh'g denied*, 439 U.S. 997 (1978).

However, according to the Commission's new argument, the only prohibition that exists in the NGA

is the prohibition against retroactive rate *reductions*. Any rate increase filed pursuant to Section 4 of the Act, according to the Commission, can be made retroactive wherever and whenever the Commission feels that it has good cause. MDG submits that such a conclusion would make a total mockery of everything Congress and the courts have ever said on this issue. *See also*, MDG Br. at 5-6.

C. The Commission's Request That The Merits Of This Proceeding Not Be Separately Briefed, But Instead Be Made Subject To The Disposition Of AGD II, Is Indefensible

As noted, *supra* at 11, in its *certiorari* petition in *AGD II*, the Commission argued that it did not violate the prohibition against retroactive ratemaking in *AGD II*, but in the process acknowledged that if it had done essentially what it did in the instant case, such conduct would have constituted unlawful retroactive ratemaking. MDG submits that that argument constitutes an admission of the correctness of the decision below in the instant case. At a minimum, the Commission's *certiorari* petition in *AGD II* clearly distinguishes the facts in *AGD II* from the facts of the instant case, and shows that the fact distinction is legally significant.

Similarly, a number of the judges in the D.C. Circuit also felt that the difference in the facts between the instant case and *AGD II* were sufficient to warrant different legal conclusions. Accordingly, whereas rehearing *en banc* was denied *per curiam* in the instant case below, Pet. App. at 15a, there was a dissent from denial of rehearing *en banc* in *Associated Gas Distributors v. FERC*, 898 F.2d 809 (D.C. Cir. 1990) (AGD II).

In any perspective, the Commission's request that the Court deny briefing in the instant case but make the disposition in the instant case subject to its disposition of *AGD II* would be an extraordinary and unsupported procedure. Such procedure essentially would deny MDG the right to be heard on the merits while in effect granting the petition for a writ of *certiorari*. However, in the context of the disparate decisions by the court below on rehearing, the Commission's own acknowledgment that the facts of the instant case are dissimilar from the facts of *AGD II* and that unlawful retroactive ratemaking would exist on the facts of the instant case, the Commission's request is truly incredible and indefensible.

As the preceding has made clear, plenary denial of the Commission's petition or summary affirmance of the court below should be ordered by this Court. However, if for any reason the Court might be inclined to any other disposition, MDG should not be denied its lawful rights to fully participate in any proceeding which would effect its interests.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Petition for A Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed by the Commission in this docket should be denied and/or the decision of the court below summarily affirmed.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
Counsel of Record
PHILIP B. MALTER
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(301) 266-7524

Attorneys for The Municipal Defense Group

August 31, 1990

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Nos. 89-2001, 90-131

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

GILES D. H. SNYDER
STEPHEN J. SMALL
COLUMBIA GAS TRANSMISSION CORPORATION
1700 MacCorkle Ave., S.E.
Charleston, W.Va. 25325-1273
(304) 357-2326

JOHN H. PICKERING
Counsel of Record
LOUIS R. COHEN
TIMOTHY N. BLACK
GARY D. WILSON
SUSAN D. MCANDREW
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Columbia Gas Transmission Corporation

August 31, 1990

(Attorneys Continued on Inside Cover)

58

DANIEL L. SCHIFFER
MICHIGAN CONSOLIDATED GAS COMPANY
500 Griswold Street
Detroit, MI 48226
(313) 256-5206

JEFFREY M. PETRASH
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
1901 L Street, N.W.
Washington, D.C. 20036
(202) 457-0160
Attorneys for Michigan Consolidated Gas Company

KATHLEEN A. KANE
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Bldg.
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 665-3222
Attorney for Philadelphia Electric Company

LARITO FARINAS
PHILADELPHIA GAS WORKS
800 West Montgomery Ave.
Philadelphia, PA 19122
(215) 684-6982
Attorney for Philadelphia Gas Works

EDWARD J. GRENIER, JR.
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for The Process Gas Consumers Group

MARY E. BALUSS
CHRISTOPHER J. BARR
MORGAN, LEWIS & BOCKIUS
1700 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 467-7142
Attorneys for UGI Corporation

QUESTION PRESENTED

Whether the power of the Federal Energy Regulatory Commission, under section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d), to "allow changes [in rates] to take effect without requiring the thirty days' notice herein provided for," includes the power to authorize pipelines to collect retroactive additional charges for gas sold long before any filing reflecting the additional charges.

RULE 29.1 STATEMENT

Respondent Columbia Gas Transmission Corporation is a wholly-owned subsidiary of The Columbia Gas System, Inc.

Respondent Michigan Consolidated Gas Company is a wholly-owned subsidiary of MCN Corporation.

Respondent UGI Corporation has one subsidiary that is not wholly-owned, A P Propane, Inc.

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IN THE

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

STATEMENT

This case involves orders of the Federal Energy Regulatory Commission granting "waivers" of the notice requirement of section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d), and thereby purportedly allowing the private petitioners, four interstate pipelines, to collect additional charges for gas sold during earlier periods. Respondents are downstream pipelines, local distribution

companies, and industrial users that are direct or indirect customers of the petitioner pipelines.[1]

The Commission initially authorized the retroactive additional charges in orders issued in 1985. In 1987, the court of appeals struck down these orders because the additional charges violated the Act's requirement that a pipeline charge only the rates on file at the time the gas is sold. Pet. App. 42a-56a (*Columbia I*).[2] No party sought review of that decision in this Court.

In 1988, on remand, the Commission issued the order now under review,[3] Pet. App. 17a-26a, again authorizing the retroactive additional charges, but now relying on its power under section 4(d) to "allow changes to take effect without requiring the thirty days' notice herein provided for." 15 U.S.C. § 717c(d). In 1990, in the decision from which petitioners now seek review, Pet. App. 1a-14a (*Columbia II*), the court of appeals held that the Commis-

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[1] The respondents for which this brief is filed are Columbia Gas Transmission Corporation, Michigan Consolidated Gas Company, Philadelphia Electric Company, Philadelphia Gas Works, the Process Gas Consumers Group, and UGI Corporation.

[2] "Pet App." refers to the appendix to the petition for writ of certiorari in *Panhandle Eastern Pipe Line Co. v. Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990).

[3] In addition to the Commission's order in the remanded proceedings, the Commission in 1988 issued an order authorizing one of the pipeline petitioners, Panhandle Eastern Pipe Line Company (Panhandle), to direct bill its customers for $17 million in certain other production-related costs that had been allowed by Orders Nos. 473 and 473-A (*Compression Allowances and Protest Procedures Under NGPA Section 110*, FERC Stats. & Regs., Regs. Preambles ¶¶ 30,747, 30,788 (1987)) based on customers' purchases from December 1979 to December 1984. Pet. App. 33a-40a. As in the orders issued on remand after *Columbia I*, the Commission relied on its section 4(d) power to waive the thirty days' notice requirement to authorize Panhandle's direct billing procedure. In the consolidated proceedings below, the court of appeals struck down the Order No. 473 direct billing order as well as the direct billing orders issued on the remand.

sion's power to waive the 30-day notice period of section 4(d) did not authorize it to impose, on unwarned and unwilling customers, a price increase for sales that occurred as much as eight years prior to the rate filing.

Neither in *Columbia I* nor in *Columbia II* did the court of appeals bar the petitioner pipelines from recovering the production-related costs that gave rise to the charges at issue. It held only that such recovery must be done prospectively—for example, by including the costs in the pipelines' charges to customers for current and future service. *See id.* at 4a, 54a. As described below, other interstate pipelines recovered the same production-related costs from their customers in that manner, as did one of the petitioner pipelines before it sought and obtained authority from the Commission in 1985 to switch to the retroactive recovery method held unlawful in this case.

1. Producers Collection of Section 110 Costs from Pipelines

In the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301 *et seq.*, Congress established ceiling prices for "first sales" [4] of certain categories of natural gas. In section 110 of the NGPA, 15 U.S.C. § 3320(a), Congress authorized the Commission to allow recovery by first sellers (*i.e.*, gas producers) of certain production-related costs, including compression and gathering costs, in addition to the maximum prices otherwise permitted by the statute.

In 1978, the Commission adopted interim regulations governing producers' applications for recovery of production-related costs pursuant to section 110. In 1980, however, in Order No. 94, *Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*, FERC

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[4] Generally, "first sales" of natural gas are sales by gas producers to pipeline companies that in turn resell the gas to other pipelines, wholesale distributors, and large industrial customers.

Stats. & Regs., Regs. Preambles ¶ 30,178 (July 25, 1980), the Commission announced that effective July 25, 1980, it would no longer accept producers' applications for recovery of compression or gathering costs until it had completed proceedings to determine appropriate generic allowances for such costs. *Id.* at 31,218. The Commission assured producers, however, that upon adoption of such allowances "a retroactive collection procedure will be provided under which the [generic allowances] . . . will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule [July 25, 1980] *if collection of such costs is contractually authorized.*" *Id.* (emphasis added).

In 1983, in Order No. 94-A, *Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act,* FERC Stats. & Regs., Regs. Preambles ¶ 30,419 (Jan. 24, 1983), and an accompanying interim rule,[5] the Commission promulgated its promised regulations authorizing producers to collect compression and gathering costs from their pipeline purchasers. Producers were authorized to collect production-related costs on a current basis beginning with the March 7, 1983, effective date of the new regulations. *Id.* at 30,355. With respect to costs incurred by producers in the period July 25, 1980, through March 7, 1983, producers were authorized to collect these costs retroactively in installments between March 1983 and December 1984 if their contracts with pipelines so provided. *Id.* at 30,368.

2. Pipelines' Recovery of Section 110 Costs from Their Customers

Order No. 94 and Order No. 94-A and the accompanying regulations dealt with collection of production-related costs by the producers from their pipeline first-purchas-

[5] 48 Fed. Reg. 5180 (1983); *see* 18 C.F.R. § 271.1104(d)(1) (1990).

ers. Neither order dealt with how the producer charges would be recovered by first-purchaser pipelines from *their* customers. At the time Orders 94 and 94-A were issued, however, long established Commission policy provided for the recovery of such costs by means of the purchased gas adjustment ("PGA") clause of a pipeline's tariff.[6] Current production-related costs, which pipelines pay currently to gas producers, would be reflected in the pipelines' current PGA-adjusted rates. With regard to a pipeline's installment payments to producers for retroactive charges, the Commission's regulations governing recovery of costs of gas purchased by pipelines expressly provided (and still provide) for prospective adjustments to a pipeline's commodity rates in order to compensate for over- and under-recovery of the costs of gas purchased in prior periods. *See* Comm. Pet. 5 n.3; 18 C.F.R. § 154.305 (1990).[7] Such prospective rate adjustments had long been held by the Commission to be the proper method of recovery by a pipeline for "deferred costs" paid to a producer in a present period but attributable to gas delivered in a past period.[8] Thus, to

[6] *See* Order No. 452, *Purchased Gas Cost Adjustment Provision in Natural Gas Pipeline Companies' FPC Gas Tariffs*, 47 FPC 1049 (1972); *see generally*, 18 C.F.R. §§ 154.301-154.310 (1990).

[7] While the PGA mechanism for "truing up" recovery of past gas costs is a departure from the normal process of setting fixed rates for the future based on estimates derived from historical experience, the court of appeals has held that it does not violate the filed rate doctrine or the rule against retroactive rate making since the amounts in question are included in current gas sales rates, and customers can take them into account in making their purchase decisions. *See Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 579-80 (D.C. Cir. 1990). Also, the PGA mechanism itself is on file as part of the pipeline's tariffs. *Cf. Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 960 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979).

[8] *See Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,150 at 61,327 (1984) (noting use of PGA mechanism to amortize deferred costs over prospective six-month period as traditional means of recovery for past period gas costs).

the extent that Order No. 94-A mentioned the *pipeline's* recovery at all, it clearly contemplated that such costs would be recovered in the traditional manner, *i.e.*, prospectively through the pipeline's PGA mechanism.[9]

Consistent with the Commission's established policy, when producers began to bill pipelines for current and retroactive compression and gathering cost allowances in 1983, some interstate pipelines paid the producers and collected those costs from their customers by means of prospective adjustments to their PGA rates. With regard to "amounts relating to past periods," the Commission specifically concluded that they were "appropriate for recovery by way of . . . [the] PGA clause through inclusion in Account No. 191 and a subsequent surcharge." *Texas Eastern Transmission Corp.*, 28 FERC ¶ 61,182, at 61,344 (1984). In accordance with the normal PGA procedure, such surcharges were recovered from pipeline customers in the six-month PGA period immediately following the payments to producers. *See* Comm. Pet. 5 n.3.

Other pipelines, however, delayed paying producers both the current and the retroactive production-related costs.[10] Beginning in 1983, some pipelines were starting to have difficulty in selling gas at prices that reflected their high-cost purchases in the late 1970s and early 1980s. By delaying payment of production-related costs, a pipeline could lower its PGA-adjusted prices relative to the PGA rates of pipelines that had instituted produc-

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[9] The Commission noted that an interstate pipeline "may receive compensation for paying . . . section 110 allowances *through its purchased gas adjustment clause.*" Order No. 94-A, FERC Stats. & Regs. at 30,369 (emphasis added).

[10] *See* Order No. 399-A, *Refunds Resulting From Btu Measurement Adjustments*, FERC Stats. & Regs., Regs. Preambles ¶ 30,612 at 31,208 (Nov. 20, 1984).

tion-cost payment and PGA recovery promptly, as the Commission's 1983 order had contemplated.

Delay in payment of production costs (and in their PGA recovery) reduced a pipeline's rates initially, but it had the effect of exacerbating the difficulty of eventual recovery of these costs from the pipeline's customers by building up the unpaid costs and increasing the size of the next PGA rate adjustment when the costs were eventually paid. To deal with this problem, petitioner Transcontinental Gas Pipe Line Corporation (Transco) sought and obtained permission in its September 1984 PGA filing to implement a special 4.5 cent prospective surcharge during the six months beginning November 1, 1984, for recovery of installments of retroactive production-related costs it anticipated paying in the last half of 1984, as well as a regular 5.5 cent prospective surcharge to recover "production related charges, both 'current' and 'retroactive,' that it had paid in the prior six months." *Transcontinental Gas Pipe Line Corp.*, 29 FERC ¶ 61,148, at 61,319 (1984).

In 1985, however, Transco—which had by then recovered over one quarter of the amounts it had paid to producers for production-related costs—reversed course. In its May 1985 PGA filing, Transco deleted the PGA surcharge the Commission had previously authorized and announced an intent to charge such amounts to its customers by a retroactive "direct bill." *See Transcontinental Gas Pipe Line Corp.*, 31 FERC ¶ 61,129 (1985).[11] Subsequently, Transco filed its "direct bill" proposal, which assessed each customer a share of the production related charges attributable to the gas Transco purchased from producers between July 1980 and August 1984 in proportion to that customer's share of gas purchased

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[11] To "avoid a double-collection," Pet. App. 70a, Transco proposed to refund the approximately $32 million that it had already recovered through its prospective PGA-adjusted rates.

from the pipeline in that period.[12] Appendix, *infra*, 5a. These charges were to be independent of and unaffected by the customer's current level of contractual entitlement or purchases from the pipeline. As the court of appeals held in *Columbia I*, the proposed charges amounted to a retroactive surcharge on rates paid by pipeline customers for gas they had purchased in past periods. Pet. App. 51a.

Transco's petition was not based on any claim that continued recovery of its production-related costs through its PGA mechanism would be impossible. Nor did Transco concede that its objective was to keep its current charges low by imposing a retroactive surcharge on completed transactions. Rather, Transco asserted that direct billing "is the most logical and equitable method of assigning cost responsibility for this extraordinary, out-of-period item." Appendix, *infra*, 15a.

3. Commission Approval of Direct Billing

In August 1985, the Commission granted Transco's direct billing proposal, finding it "equitable" because it "imposes the cost responsibility on the customers who bought the gas." Pet. App. 70a.

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[12] The petitioner pipelines state that the question presented is whether the Commission may permit recovery of costs that arose during the 1980-83 "moratorium" period and argue throughout their petition that the Commission's "moratorium" on collection by producers of production-related costs makes the retroactive recovery by pipelines equitable and lawful. *See* Pan. Pet. (i), 3, 7, 11, 16, 20; *cf.* Comm. Pet. 8, 12. It should be noted, however, that the "moratorium" was lifted as of March 7, 1983. Yet in each case, the petitioner pipelines sought and were authorized to recover production-related costs incurred for gas sold in a "retroactive period" that went well beyond the end of the "moratorium." *See* Pet. App. 61a (Transco: July 25, 1980 to August 31, 1984); 87a (Texas Gas: August 1, 1980 to December 31, 1984); 99a (Trunkline: July 25, 1980 to February 28, 1985); 110a (Panhandle: August 1, 1980 to February 28, 1985).

The Commission rejected contentions by a number of protesters that the proposal constituted an unlawful retroactive increase in the rates charged for past gas sales. The Commission dismissed these contentions as "without merit" and "in effect . . . a collateral attack on Order No. 94-A" because "Order No. 94-A expressly authorized the collection of retroactively effective allowances which, to the extent directly billed now, are a cost to those customers." *Id.*[13]

Following Transco's direct billing proposal, a number of other pipelines—including Texas Eastern Transmission Corporation and petitioners Texas Gas Transmission Corporation, Panhandle Eastern Pipe Line Company and Trunkline Gas Company—also filed direct billing proposals modeled after Transco's.[14] In a series of orders issued late in 1985, the direct billing proposals of these four pipelines were approved on the basis of the *Transco* precedent. Pet. App. 79a-86a (Texas Eastern); 87a-96a (Texas Gas); 97a-109a (Trunkline); 110a-123a (Panhandle). At about the same time, on rehearing of its Transco approval, the Commission again rejected contentions that the direct billing scheme constituted an unlawful retroactive rate increase, asserting once again that "Order No. 94-A expressly authorized the collection of retroactively effective allowances." *Id.* at 129a. Responding to the argument that similar deferred costs had

[13] The Commission also waived the provisions of its regulations requiring that all changes in pipeline rates be reflected in filed tariff sheets. The Commission found that no purpose would be served by such filing in view of the retroactive nature of the new "rates":

> Any such [tariff] sheets would necessarily change each month and would consist of a listing company-by-company, of the actual amounts billed. . . . [T]he original gas costs to which these section 110 payments apply were reflected on tariff sheets. *Here, we are permitting retroactive change in those costs* . . . .

Pet. App. 72a (emphasis added).

[14] *See id.* at 79a; 87a; 97a; 110a.

always been recovered prospectively through PGA adjustments, the Commission stated that the production-related cost payments were "different" because "these amounts [the production-related costs] were authorized by special rule on a continuing, not a one-time only, basis, and are so large as to warrant special treatment." [15] *Id.* Subsequently, the Commission likewise denied rehearing of its approval of the four other pipelines' direct billing proposals. *Id.* at 134a (Texas Eastern); 135a (Texas Gas); 136a-39a (Trunkline); 140a-42a (Panhandle).

4. Judicial Review and Reversal of Retroactive Direct Billing

A number of customers of the five pipelines challenged these orders in the D.C. Circuit on the ground that they constituted an unlawful retroactive rate increase. In *Columbia I*, the court of appeals overturned the Commission's approval of the five direct billing proposals. The court found that the orders violated the rule against retroactive ratemaking, which it characterized as "derived from the provisions in the NGA requiring sellers of natural gas to file their rates with the Commission

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[15] Claims that these costs are "extraordinary" are, at the very least, exaggerated. For example, in May 1984 the Commission found a Transco proposal for PGA recovery of some $61 million in deferred costs over a six month period to be "consistent" with Transco's history of recovering other deferred costs ranging from $53 million to $89 million in other recent six-month periods. *Transcontinental Gas Pipe Line Corp.*, 27 FERC ¶ 61,227 at 61,437 n.6 (1984). Similarly, in 1984 the Commission authorized another petitioner—Panhandle—to recover through its PGA over a 39-month period an "enormous" build-up of unrecovered gas costs attributable to past periods amounting to some $270 million. *See Panhandle Eastern Pipe Line Co. v. FERC*, 777 F.2d 739 (D.C. Cir. 1985). Some pipelines also recovered through PGA adjustments the costs arising from repricing their own production pursuant to the decision in *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530 (5th Cir. 1981), *aff'd in part and vacated in part sub nom. Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). *See, e.g., Consolidated Gas Supply Corp.*, 24 FERC ¶ 61,271 (1983).

[section 4] and defining its authority to modify them [section 5]." Pet. App. 52a. The court described these statutory provisions as forming the basis for the "filed rate doctrine" as articulated by this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (*Arkla*):

> [T]he [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.

The court found that the direct billing orders of the Commission violated the rule against retroactive ratemaking and the filed rate doctrine because:

> the effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA.

Pet. App. 51a.

The court rejected the Commission's argument that Order No. 94-A in 1983 had established a "retroactive collection procedure" for pipelines. The court pointed out that Orders 94 and 94-A were addressed solely to recovery of production-related costs by producers from first purchasers, and the orders did not deal with the procedures for collection by pipelines from their customers. *Id.* The court concluded that there was no reason at all for pipeline customers in 1980-83 to suppose that they would be subject to retroactive direct charges, since such recovery had never been permitted by Commission policy and the Commission's regulations expressly required that such deferred costs be recovered prospectively through the PGA mechanism.

The Commission petitioned for rehearing, asserting for the first time that it had authority under section 4(d) of the Natural Gas Act to "waive" the filed rate doctrine to allow the direct billing procedures to go into

effect. *See* Pet. App. 58a-59a. The court denied rehearing but stated that the Commission could consider on remand whether the statute permits a waiver of the filed rate doctrine and, if so, whether such a waiver would be appropriate in the circumstances of these cases. *Id.* at 59a.

5. The Commission's Effort To Sanction Retroactive Direct Billing by Waiver

Without any hearing or further proceedings, the Commission on remand again approved the same direct billing mechanisms that the court had struck down in *Columbia I.* Pet. App. 17a-26a. This time, the Commission relied solely on its authority under section 4(d) of the Act to "allow changes to take effect without requiring the thirty days' notice herein provided for." The Commission asserted that its "authority to waive the filed rate doctrine and its discretion whether to exercise this authority in particular circumstances are unquestioned," subject only to the statutory requirement that the waiver must be based on "good cause shown." *Id.* at 21a. FERC found that good cause existed for waiver of the filed rate doctrine in each of the remanded proceedings for the same reasons advanced in its original orders approving the rate changes. *Id.* at 22a-23a.

Several of the present respondents sought rehearing, arguing that the Commission could not rely on its waiver authority under section 4(d) to impose a retroactive rate increase, that the Commission had failed to explain its departure from its longstanding policy of permitting waivers only to allow previously contracted-for rates to take effect prospectively from the date set by the contract, and that the Commission does not have equitable powers to take actions that are contrary to the statute. *See* Pet. App. 28a-29a. The Commission rejected these arguments on the basis of an unexplained "overwhelming public interest" that would be "impeded" by normal prospective ratesetting. *Id.* at 32a.

6. The Decision Below Rejecting the Claimed Waiver Authority To Impose Retroactive Rate Increases

In *Columbia II*, the court of appeals rejected the Commission's argument that its waiver authority permits it to allow a pipeline to impose additional charges for transactions completed before any rate filing containing the charges. The court noted that the language of section 4(d) only authorizes the Commission to allow rate changes "to take effect without requiring the thirty days' notice herein provided for." Pet. App. 10a. The court also pointed out that the few decisions that have allowed rate changes to become effective as of a date prior to their filing had all been cases in which the customers had by contract prospectively consented to the pre-filing effective date. *Id.* at 11a-12a. The court concluded, without reaching the question of "good cause," that the Commission lacked statutory power to do what it did: "[W]e are unaware of any principle in equity or law that empowers an agency to ignore explicit legislative commands . . . ." *Id.* at 13a.

The private petitioners, but not FERC, sought rehearing *en banc*, which was denied unanimously. *Id.* at 15a.

ARGUMENT

The court of appeals properly rejected FERC's assertion, made for the first time in this case, that FERC's power under section 4(d) of the Natural Gas Act to allow rate "changes to take effect without requiring the thirty days' notice herein provided for" includes the power to allow a pipeline to impose a retroactive additional charge for gas sales that occurred years earlier. FERC's reading of the statute would obliterate (but only in favor of sellers and not for the protection of customers) the well-established principle that FERC has "no power to alter a rate retroactively." *Arkla*, 453 U.S. at 578. This case presents no issue worthy of this Court's review.

Certiorari Is Not Warranted in This Case

1. Contrary to the Solicitor General's submission, the court of appeals' ruling was based squarely on the statute. In *Columbia I*, from which no party sought review in this Court, the court of appeals first found that "the effect of [FERC's] orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase." Pet. App. 51a.[16]

Decades of authority have established that under the Natural Gas Act, as under other major federal ratemaking statutes, the Commission may neither authorize a "rate increase for gas already sold" nor impose a "retroactive rate alteration." *Arkla*, 453 U.S. at 578 and n.8. This rule against retroactive ratemaking, as the court of appeals held (*Columbia I*, Pet. App. 51a-52a), flows directly from sections 4 and 5 of the Act, which require that charges for jurisdictional natural gas service be set forth in publicly filed tariffs and that any changes in those rates be made prospectively. In *Columbia II*, the court's discussion centered on "the scope of the section 4(d) waiver authority" (*id.* at 9a), and its ruling was that "the statutory language of section 4(d) and the logic of [certain earlier decisions] deny the Commission the authority its claims." *Id.* at 10a.

Section 4(c), 15 U.S.C. § 717c(c), requires that rates be set forth in tariffs filed with the Commission. Pipeline-initiated changes to filed rates are governed by section 4(d), 15 U.S.C. § 717c(d). That section first

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[16] Neither the Commission nor the pipeline petitioners challenged or now challenge the court of appeals' holding in *Columbia I* that the "direct billing" proposals approved by the Commission impose on pipeline customers an added charge for gas those customers had already purchased. As the Fifth Circuit held in *Hall v. FERC*, 691 F.2d 1184, 1191 (5th Cir.), *cert. denied sub nom. Arkla, Inc. v. Hall*, 464 U.S. 822 (1983), a "purer example" of a retroactive rate increase would be "difficult to imagine."

provides that no change may be made in any filed rate "except after thirty days' notice to the Commission and to the public." The notice may be given only "by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes . . . and the time when the change or changes *will* go into effect." *Id.* (emphasis added). The next sentence provides that the Commission "for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they *shall* take effect and the manner in which they *shall* be filed and published." *Id.* (emphasis added).[17]

On its face, section 4(d) gives the Commission only the power to shorten or eliminate the required thirty-day notice period.[18] The statute requires a pipeline to make its filing thirty days before the rate changes "will" go into effect. It permits the Commission to dispense with this notice, but only by an order specifying when the changes "shall" go into effect. Nothing in this language suggests that the Commission may allow an additional charge to be imposed on gas sales completed before the change-of-rate filing is made.

Consistent with these basic statutory provisions, this Court has held that the Commission may not allow a

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[17] Section 5, 15 U.S.C. § 717d, which is not involved in this case, provides the only other means by which rates may be changed, and it too makes clear that changes are to be prospective only. It provides that if the Commission reaches a determination that existing rates are unjust or unreasonable, the Commission may then prescribe the just and reasonable rate "to be thereafter observed." *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). (*Sierra* arose under the corresponding section of the Federal Power Act. The Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkla*, 453 U.S. at 577 n.7.)

[18] The Commission concedes in its petition that section 4(d) "can be" so read. Comm. Pet. 13.

pipeline to alter rates retroactively, pursuant to new tariffs filed by the pipeline under section 4. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962). The D.C. Circuit has followed suit, holding that the Act bars the "Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (quoted with approval in *Arkla*, 453 U.S. at 578). That court has described this as a "cardinal principle of ratemaking" that binds both the utility in initially setting its rates and the Commission in approving or imposing changes in those rates. *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975). Not surprisingly, neither the Commission nor the petitioner pipelines have cited any decision of this or any other court permitting the retroactive imposition of an additional charge on customers for gas bought in prior periods.[19]

The reading of the statute now urged by the Commission and the petitioner pipelines would produce a bizarre result contrary to the clear intent of the Act. Both petitioners are clear that the Commission has no authority to impose a retroactive rate *reduction* under section 5, even after finding (on a customer complaint or its own initiative) that a filed rate is unjust and unreasonably high (Comm. Pet. 17; Pan. Pet. 13-14): Section 5 permits the Commission only to prescribe a rate "to be thereafter observed," and this Court has squarely held that FERC is limited by the section to prescribing a reasonable rate for the future. *See* note 17, *supra*. But the Commission argues it may approve retroactive rate *increases* sought

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[19] Petitioner pipelines' suggestion, Pet. 11, that this case does not "concern the filed rate doctrine," since "no party here is seeking to enforce a rate not filed with and accepted by, the Commission," is specious. It is directly refuted by this Court's holding in *Arkla* that a "retroactive rate increase" is "precisely what the filed rate doctrine forbids." 453 U.S. at 578-79. Indeed, on the remand after *Columbia I*, the Commission stated that the issue was whether it should "waive the filed rate doctrine." Pet. App. 21a.

by a pipeline under section 4 whenever it finds "good cause." That asymmetrical outcome would stand on its head a statutory scheme whose primary purpose was to provide a "complete, permanent and effective bond of protection" for consumers. *Atlantic Ref. Co. v. Public Serv. Comm'n,* 360 U.S. 378, 388 (1959). It is hardly surprising that no court or (until these cases) agency has so read the statute.

2. Petitioners make several further arguments in support of a grant of the writ in this case. None has merit.[20]

a. Contrary to the submissions of the petitioner pipelines, this case does not present the "waiver" question left unresolved by this Court in *Arkla.* That case involved a rate that had been *contractually agreed to* but not filed. The Court said, 453 U.S. at 578 n.8 (emphasis by the Court):

> Although the Commission may not *impose* a retroactive rate alteration . . . it may 'for good cause shown' . . . waive the usual requirement of timely filing of an alteration in a rate. Assuming, *arguendo,* that waiver is available for retroactive collection of a higher rate than the one on file, we note that [the Commission expressly rejected any waiver in this case].

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[20] The petitioner pipelines imply that this case is important because what is at issue is "approximately $1.5 billion" in industry-wide "moratorium" period costs. Pan. Pet. 3. Where the figure came from is unclear. (The Commission at one point noted estimates of "up to" that figure. Pet. App. 29a n.8). But in any event, most of these costs have long since been paid and recovered through mechanisms that have not been challenged.

The Commission more accurately estimates the magnitude of the costs at issue here as the approximately $500 million in production-related costs that petitioner pipelines and Texas Eastern have collected under the direct bill mechanisms authorized by FERC's orders. Comm. Pet. 7 n.5. A part of that amount, however, plainly related to recovery of costs arising out of gas sold well after the end of the "moratorium" period. *See* note 12, *supra.*

The present case, unlike *Arkla*, involves an attempt to "impose" a retroactive rate increase on unwilling customers who fully paid the rates that were on file when the sales in question were completed; nothing in *Arkla* suggests that there is any open question about whether the Commission has power to do that.

b. Petitioners cite cases in which courts of appeals have permitted the Commission, acting under section 4 (d), to sanction a pre-filing effective date for a rate change agreed to by the parties before it became effective.[21] The rationale for these rulings was that the change was not "retroactive" where the parties to the change had agreed to it in advance by contract. The continuing validity of these decisions may be in question;[22] in any event, they have no bearing here: whether the Act permits the Commission to allow a private contract, phrased prospectively, to take effect, in accordance with the wishes of the parties, prior to the date of filing is *not* the issue in this case. What the court below declared (consistent with every other decided case) is that the seller and the Commission together cannot retroactively *impose* a rate change never agreed to by the customer.

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[21] Comm. Pet. 14-15, citing *City of Piqua*, 610 F.2d 950 (D.C. Cir. 1979); *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1983); *Towns of Concord & Wellesley v. FERC*, 844 F.2d 891 (1st Cir. 1988); Pan. Pet. 14 n.7, citing *City of Piqua*.

[22] All of the cited decisions were rendered before this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, No. 89-624, 110 S. Ct. 2759 (1990), rejecting the authority of the Interstate Commerce Commission to allow negotiated rather than filed rates to be charged. The Court has, in other contexts, recognized that private contracts have an important role under the Natural Gas Act, which differs in this regard from the Interstate Commerce Act. *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956). Whether this role distinguishes *City of Piqua*, *Hall*, and *Concord* sufficiently to allow them to survive *Maislin* is a question not presented in this case.

c. The pipeline petitioners stress the fact that in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986), the court of appeals rejected a challenge to FERC's Order No. 94-A, which authorized *producers* to recover earlier production-related costs through retroactive charges to pipelines. But as the Fifth Circuit stressed, "the purchasers [*i.e.*, the pipelines] were on notice as of 1980 [the beginning of the production-cost period, by virtue of FERC Order No. 94] that allowances would eventually be promulgated" (*id.* at 1066). Moreover, Order No. 94 expressly provided for such recovery from pipelines only "if collection of such costs is contractually authorized." FERC Stat. & Regs. at 31,218.

There is no conflict between the decision below and the Fifth Circuit's decision in *Texas Eastern*. The Fifth Circuit's decision allowed retroactive cost recovery *by producers* pursuant to the explicit advance notice given in 1980 in Order No. 94, and in accordance with express authority in the existing contracts between producers and pipelines. *Compare City of Piqua*, 610 F.2d at 954. In the present case, respondent pipeline customers neither received advance notice of the charges in question (by Commission order or otherwise) nor contractually authorized the pipelines to collect them.[23]

As noted above, the decision below does not bar pipelines from recovering from their customers the costs allowed to be charged to them by producers under *Texas-Eastern*;[24] it merely requires that this be done by means that do not constitute a retroactive rate increase.

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[23] Petitioners suggest that because one of the respondents, Columbia, is itself a pipeline, it was effectively on notice of the charges the Commission ordered in the present case. Even if the accidental status of one of the respondents were pertinent, there can be no question that *no one* was on notice before 1985 that pipeline *customers* would be direct-billed, based on their purchases in 1980-85, for these costs.

[24] For this reason there is no merit to suggestions that the court of appeals' decision violates the "pass through" requirement of the

d. Contrary to FERC's implication, Comm. Pet. 5-6, the restructuring of the gas industry in which pipelines became "open access" transporters has essentially nothing to do with the issues in this case.[25] FERC began authorizing retroactive direct billing of production-related costs *before* it issued FERC Order No. 436,[26] which encouraged pipelines to become open access, and all of the FERC orders that originally authorized such billing by the pipeline petitioners were issued before such petitioners became open-access pipelines.

NGPA. As the Commission has itself recognized, that Act does not require that pipelines be afforded guaranteed recovery of costs, but merely a *fair opportunity* to recover legitimate costs. *See* Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 at 30,786 (Aug. 7, 1987). The Commission and the court of appeals have repeatedly recognized that the PGA mechanism affords such an opportunity to recover gas costs.

[25] The Commission incorrectly states that only one producer began recovery of costs before the 1985 decision of the Fifth Circuit in *Texas Eastern*. Comm. Pet. 5. In fact, the Commission had ordered that all costs for the 1980-83 period be recovered in installments ending in December 1984, and some pipelines paid their producers as the Commission envisioned. *See* p. 6, *supra*.

It may well be that other pipelines delayed paying production-related costs pending judicial review of Order No. 94-A in the hope that it would be reversed on appeal. But there was no stay of Order No. 94-A in effect, and having failed to process and recover production-related costs in the time provided for by the Commission, petitioner pipelines should not be heard to complain as they now do that "the customer base of the pipelines had changed to an unprecedented degree between the lifting of the Commission's moratorium in 1983 and the time of the Fifth Circuit's *Texas Eastern* decision in 1985" by which time "the pipeline segment of the industry was in the process of a massive restructuring." Pan. Pet. 6-7.

[26] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (Oct. 9, 1985).

Moreover, the argument that the Commission should be able to ignore the filed rate doctrine because it needs "latitude" in order to deal with "the massive restructing of the natural gas market" (Comm. Pet. 19) was decisively answered by this Court in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, No. 89-624, 110 S. Ct. 2759 (1990). As the Court said there, if "strict adherence" to statutory requirements has become "an anachronism," the responsibility for modifying the statutory scheme lies with Congress. *Id.* at 2771.[27]

Indeed, the expansive view of the Commission's section 4(d) waiver powers espoused by petitioners is fundamentally inconsistent with the view of the filed rate doctrine taken by this Court in *Maislin.* While the role of the filed rate doctrine under the Natural Gas Act is not identical to that under the Interstate Commerce Act, there is no basis for contending that the protective purposes of the doctrine are less fundamental or less grounded in statute here. To the contrary, in light of the long history of interpretation of the Natural Gas Act referred to above, it is clear that what this Court said of the agency's effort to rewrite the statute in *Maislin* is equally true here: "Although the Commission has both the authority and expertise generally to adopt new policies when faced with new development in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute." 110 S. Ct. at 2770.

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[27] There is no substance to petitioners' suggestion that the holding below will have untoward effects on the electric power industry. The traditional view of the filed rate doctrine reflected in the decision below has already (and for many years) been applied under the Federal Power Act, with no apparent adverse effects on the electric power industry. *See, e.g., Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *Public Serv. Co. v. New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir. 1979).

There Is No Reason to Hold This Case for Disposition of the Petitions in *AGD*

The Commission does not seek plenary review in this case but suggests that it be held pending the Court's disposition of the petitions in *Associated Gas Distribs. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *petitions for cert. pending*, Nos. 89-1988, *et al.* (*AGD*), in which it has sought plenary review. That suggestion is unfounded. The Commission's suggestion assumes that the Court will grant its petition in *AGD*—an assumption that may well prove wrong.[28] But even if review were warranted in *AGD*, ~~this~~ case presents an essentially different question from that presented here, and resolution of *AGD* is highly unlikely to have any bearing on the outcome here.

The question for which review is sought in *AGD* is whether a surcharge imposed to recover certain pipeline "take-or-pay" costs is, as the court of appeals found, retroactive and, therefore, prohibited by the statute's requirement that a pipeline charge only the "filed rate." No question of a Commission waiver (under section 4(d) or otherwise) is involved in any way in that case. Instead, the Commission's rationale in seeking review in *AGD* is that the costs at issue there are "present" costs merely allocated on the basis of past customer purchase decisions.

In this case, by contrast, no one seriously disputes that the Commission's orders impose a retroactive rate increase otherwise forbidden by the statute;[29] the only

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[28] Certain of the respondents here are also respondents in *AGD* and have filed a Brief in Opposition setting forth the reasons why certiorari is not warranted in that case. If the Court agrees, the Commission's suggestion here would of course be moot.

[29] The Commission itself has recognized that its orders authorize a "retroactive change" in costs charged to pipeline customers. *See* note 13, *supra*.

question presented is whether the Commission's section 4(d) waiver power enables it to authorize a result it could not otherwise bring about. In sum, there is nothing in the grounds asserted for review in *AGD* that gives any reason to expect that any foreseeable disposition by the Court of those petitions would affect the holding of the court of appeals in this case.

The Commission's suggestion (Pet. 19) that this case is related to *AGD* in that both involved cost allocation by pipelines in the wake of Order No. 436 and the "massive restructuring of the natural gas market" toward open access is simply wrong. As noted above, the FERC orders that originally authorized retroactive direct billing by the petitioner pipelines all preceded the times when the petitioners became open-access pipelines under Order No. 436. Chief Judge Wald, whose dissent from the denial of rehearing *en banc* in *AGD* was based on her (erroneous) understanding of the role of Order No. 436 in that case, concurred in the denial of rehearing here. Pet. App. 15a.

CONCLUSION

For the reasons set forth above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

Giles D. H. Snyder
Stephen J. Small
Columbia Gas Transmission Corporation
1700 MacCorkle Ave., S.E.
Charleston, W.Va. 25325-1273
(304) 357-2326

John H. Pickering
Counsel of Record
Louis R. Cohen
Timothy N. Black
Gary D. Wilson
Susan D. McAndrew
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Columbia Gas Transmission Corporation

DANIEL L. SCHIFFER
MICHIGAN CONSOLIDATED GAS COMPANY
500 Griswold Street
Detroit, MI 48226
(313) 256-5206

JEFFREY M. PETRASH
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
1901 L Street, N.W.
Washington, D.C. 20036
(202) 457-0160

Attorneys for Michigan Consolidated Gas Company

KATHLEEN A. KANE
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Bldg.
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 665-3222

Attorney for Philadelphia Electric Company

LARITO FARINAS
PHILADELPHIA GAS WORKS
800 West Montgomery Ave.
Philadelphia, PA 19122
(215) 684-6982

Attorney for Philadelphia Gas Works

EDWARD J. GRENIER, JR.
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100

Attorneys for The Process Gas Consumers Group

MARY E. BALUSS
CHRISTOPHER J. BARR
MORGAN, LEWIS & BOCKIUS
1700 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 467-7142

Attorneys for UGI Corporation

August 31, 1990

APPENDIX

APPENDIX

DEPARTMENT OF ENERGY
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C.

Docket No. RP85-148-000

IN THE MATTER OF
TRANSCONTINENTAL GAS PIPE LINE CORPORATION

PETITION OF
TRANSCONTINENTAL GAS PIPE LINE
CORPORATION FOR AUTHORITY TO INSTITUTE
DIRECT BILLING PROCEDURE FOR
RETROACTIVE ORDER NO. 94 PAYMENTS

Communications with respect to this Petition should be addressed to:

*R.V. Loftin, Jr., Vice President
and General Counsel
James A. Porter
Transcontinental Gas Pipe Line
Corporation
P.O. Box 1396
Houston, Texas 77251

and

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* Designated to receive service in accordance with Rule 2010(c) of the Rules of Practice and Procedure.

*Thomas F. Ryan, Jr.
Robert G. Hardy
Andrews & Kurth
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Transcontinental Gas Pipe Line Corporation

Filed: May 22, 1985

DEPARTMENT OF ENERGY
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C.

Docket No. ——————

IN THE MATTER OF
TRANSCONTINENTAL GAS PIPE LINE CORPORATION

PETITION OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION FOR AUTHORITY TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE ORDER NO. 94 PAYMENTS

Transcontinental Gas Pipe Line Corporation (Transco) hereby petitions, pursuant to Rule 207 of the Commission's Rules, 18 C.F.R. § 385.207, for authority to institute a special, one-time direct billing procedure to recover from its customers retroactive payments made pursuant to Order Nos. 94 and 94A, all as more fully explained hereinbelow.

In support of this Petition, Transco respectfully shows as follows:

I.

The names, titles and mailing addresses of the persons to whom correspondence concerning this proceeding are to be addressed are as follows:

R.V. Loftin, Jr., Vice President
and General Counsel
Transcontinental Gas Pipe
Line Corporation
P.O. Box 1396
Houston, Texas 77251

and

Thomas F. Ryan, Jr.
Andrews & Kurth
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

II.

Transco is a corporation duly organized and existing under the laws of the State of Delaware, with its prinpal place of business in Houston, Texas.

Transco is a natural gas company engaged in the transportation and sale of natural gas in interstate commerce by means of its natural gas transmission system extending from its principal sources of natural gas supply in Texas, Louisiana, Mississippi, and the offshore Gulf of Mexico area through the States of Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey to its termini in the New York City Metropolitan area. To augment its domestic gas supply sources, Transco also imports natural gas from Canada.

III.

SUMMARY OF PROPOSED DIRECT BILLING PROCEDURE [1]

Because of the inequities and undesirable market distortions inherent in recovering retroactive Order No. 94 costs through PGA filings, Transco seeks authorization to bill customers directly for such costs. As more fully explained below, Transco proposes to calculate each customer's share of such costs for the retroactive period (hereinafter defined as the period July 25, 1980 through August 31, 1984 unless otherwise indicated) based upon a matching of the incurrence of Order No. 94 costs, by month, to the customer's share of system purchases during such months. Such amounts will be billed directly, including interest, in equal monthly installments over a succeeding 12-month period commencing July 1, 1985

[1] Inasmuch as the instant filing is not a tariff filing, no fee under Part 381 of the Commission's Regulations is required. *See*, 29 FERC ¶ 61,381 (1984).

(or at the customer's option, in a lump sum[2]) or at such later date as may be established in the Commission's order approving the direct billing procedure. Transco also is proposing to refund directly to its customers all retroactive Order No. 94 amounts collected, plus interest, pursuant to Transco's PGA filings in Docket Nos. TA84-2-29-000 and TA85-1-29-000, including the special Order No. 94 surcharge of 4.5 cents per dt contained in Transco's Docket No. TA85-1-29-000 filing, such refund (the principal amounts of which are detailed on Schedule B hereto) to be contingent upon approval of the direct billing procedures proposed in the instant filing. This refund will be made within fifteen days of the date on which the Commission approves Transco's direct billing procedure. In essence, Transco's proposal is designed to place customers in the position they would have been in if no retroactive Order No. 94 costs had been collected in Transco's rates to date, and then to apportion the total costs to customers on the basis of their respective purchase levels from Transco during the period such costs were incurred.

IV.

PERTINENT BACKGROUND

A. *Order 94 Costs*

Pursuant to Section 110 of the Natural Gas Policy Act of 1978, the Commission has established "production-related cost" allowances above the otherwise applicable maximum lawful ceiling price for nautral gas. These allowances encompass certain costs (other than "produc-

[2] While providing for a lump-sum payment option, Transco anticipates that most, if not all, customers would consider the twelve monthly installment payments to be in the best interests because, among other things, such method eases the financial burden and also could obviate payment, at least in part, if the pending court proceedings (see page 4, *infra*) were to overturn Order No. 94 during the interim.

tion costs") incurred for delivering, compressing, treating or conditioning nautral gas or other specified services. In Order No. 94 (issued July 25, 1980 in Docket No. RM80-47), the Commission stated that generic allowances for compression and gathering would be developed in future orders and made effective as of the date of Order No. 94. On January 24, 1983, the Commission issued Order No. 94-A, titled "Final Rule and Order on Rehearing of Order No. 94" amending the statement of policy. 22 FERC ¶ 61,055. The aforementioned generic allowances were first stated in an Interim Rule also issued January 24, 1983 in Docket Nos. RM80-73 and RM80-47 and were made effective March 7, 1983. The amendments of the Interim Rule were issued as a Final Rule in Order No. 334, issued September 27, 1983. Order 334-A, issued December 27, 1983, denied the petitions for rehearing and petitions for stay of Order 94. The allowances for production-related costs are set out at Section 271.1104 of the Commission's Regulations (18 C.F.R. § 271.1104).

Order Nos. 94 and 94-A have been appealed to the United States Court of Appeals for the Fifth Circuit by Transco and others in *Texas Eastern Transmission Corporation, et al. v. FERC*, No. 83-4390. Briefs have been filed by the parties and oral argument has been held; the case is pending a decision by the court.

Subsequently, the Commission issued Order No. 399-A, 29 FERC ¶ 61,254 (1984), which authorized producers to offset refunds due for Btu measurement requirements[3] by monies due them under Order No. 94. This "offset" procedure was overturned by the court in *Interstate Natural Gas Association of America v. FERC*, D.C. Cir. No. 81-1690, *et al.*, issued March 5, 1985. Such action was taken by the court at the behest of Associated Gas Distributors, a group which includes many of Transco's

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[3] Interstate Natural Gas Association of America v. FERC, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1615 (1983).

larger customers. Therefore, as matters now stand, retroactive Order No. 94 payments apparently cannot be offset by refunds for the Btu measurement rules.[4]

B. *Transco's Treatment Of Order 94 Costs*

Transco has been invoiced for substantial retroactive Order No. 94 amounts. A substantial part of these amounts has been paid, debited to Account No. 191 and flowed-through in two Transco PGA filings. All of the retroactive Order No. 94 amounts that were paid prior to September 1, 1984 have been reflected in Transco's PGA filing in Docket No. TA84-2-29-000 (effective May 1, 1984)[5] or in Transco's PGA filing in Docket No. TA85-1-29-000 (effective November 1, 1984).[6]

In its PGA filing in Docket No. TA85-3-29-000 (effective April 1, 1985), Transco indicated that it would be seeking Commission authority to direct bill Order No. 94 payments. In that regard, Transco explained that its filing did not reflect the balance (at February 28, 1985) in the appropriate subaccount of Account No. 191 associ-

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[4] It is Transco's understanding that although D.C. Circuit's mandate was issued on May 20, 1985, at least one—and perhaps more—of the interested parties intends to seek a writ of certiorari from the Supreme Court.

[5] In Docket No. TA84-2-29-000, Transco included approximately $2.2 million of retroactive Order No. 94 payments in its PGA deferred account. This amount reflects retroactive payments related to the period July 25, 1980 through August 31, 1983.

[6] In Docket No. TA85-1-29-000, Transco included approximately $22.4 million of retroactive Order No. 94 payments in its PGA deferred account. This amount reflects retroactive payments related to the period July 25, 1980 through February 29, 1984. In addition, Transco requested, and was granted, waiver of the Commission's regulations to include in the PGA and recover through a special surcharge of 4.5 cents per dt, approximately $21.6 million of known installment payments that Transco had not made at the time the PGA was filed but would make before the end of the period the rates in Docket No. TA85-1-29-000 were to be in effect.

ated with the relevant PGA period, $7,074,086, which amount relates to Order No. 94 payments not reflected in the surcharge and not previously contained in the deferred account. This amount remains deferred on Transco's books pending the outcome of the direct billing procedure proposed herein.[7] Transco's filing also explained that its direct billing procedure would include provision for crediting to customers the amounts already paid, including amounts paid through the special 4.5 cents per dt surcharge.

In addition, Transco has paid additional retroactive Order No. 94 amounts since February, 1985 and also is now processing a large amount of retroactive Order No. 94 invoices which, due to the time involved in verifying each such invoice, have not yet been paid. An accurate estimate of the timing of such payments cannot be made at this time.

There are other qualifying producers (*i.e.*, those which have made a proper notice filing in accordance with Section 271.1104 of the Commission's Regulations) to whom Transco also owes a substantial amount of retroactive Order No. 94 costs, but for which Transco has not received invoices. With respect to amounts attributable to the period after March 6, 1983, Transco may not receive invoices since such amounts relate to periods subsequent to the Commission-defined retroactive period and, therefore, as is the case for normal gas cost payments, invoices are not required for payment to be made. Pro-

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[7] In its April 30, 1985 order in Docket No. TA85-3-29-000, the Commission, among other things, ordered Transco to furnish additional information regarding Order No. 94 charges, and to file revised PGA tariff sheets to recover Order No. 94 payments during the period covered by the current PGA, without prejudice to Transco's direct billing proposal. Transco intends to file revised tariff sheets but also to seek a stay of their effectiveness pending action on the instant petition, and to seek clarification of the Commission's April 30 order with respect to the revised PGA filing required thereby.

ducers will be paid for these amounts once Transco has verified the amount of the Order No. 94 allowance due, and these unit amounts are entered into Transco's gas purchase payment system.

V.

DESCRIPTION OF TRANSCO'S PROPOSED DIRECT BILLING PROCEDURE

A. *The "Retroactive" Period Is July 25, 1980 Through August 31, 1984*

Transco proposes to accumulate in a special subaccount of FERC Account No. 191 on its books all retroactive Order No. 94 amounts which it has paid or expects to pay related to the period July 25, 1980 through August 31, 1984. In that connection, Transco has been invoiced for substantial retroactive Order No. 94 amounts related to the period after March 6, 1983 (the effective date of Commission Order No. 94 and the termination date of the Commission-defined "retroactive" period). In numerous cases, these invoices were received several months after the period to which the payment applies and many of these invoices have yet to be verified. Due to the magnitude of these amounts and the time involved in verifying such amounts, these amounts could not be paid within a reasonable time after the period to which payments apply. Therefore, Transco is proposing to include payments related to periods after the Commission-defined "retroactive" period in the instant direct billing procedure. In that regard, however, Transco proposes to exclude from the total retroactive Order No. 94 amounts included in this special subaccount any such payments made over the deferral periods in Docket Nos. TA84-2-29 and TA85-1-29 (September, 1983 through February, 1984, and March, 1984 through August, 1984, respectively) which related to production during those deferral periods. Transco proposes to exclude such amounts from its special

subaccount since it views these amounts as essentially "current" payments and therefore such amounts are more appropriately recovered through the normal PGA mechanism rather than through the proposed direct billing procedure.

B. *Description of Direct Billing Procedure; Refunds For Past Collections*

The total retroactive Order No. 94 amounts which will be debited to Transco's special subaccount will be detailed by the production month to which they apply. These monthly amounts will be allocated to Transco's sales customers based on each such customer's share of purchases during each month of the proposed retroactive period. Allocating these amounts to customers on this basis results in the most equitable distribution of the cost responsibility related to these amounts, as discussed more fully in Part VI below.

As a part of the instant petition, Transco is proposing to refund directly all amounts, plus interest, Transco has recovered from the customers as a result of having included certain of these retroactive Order No. 94 amounts in Transco's PGA filings in Docket No. TA84-2-29-000 and Docket No. TA85-1-29-000, including amounts recovered from Transco's customers as a result of the 4.5 cents per dt special Order No. 94 surcharge which became effective November 1, 1984 in Docket No. TA85-1-29-000. Such refunds, detailed by customer and by PGA filing, are reflected on Schedule B, attached. The refunding of these amounts is contingent upon Transco receiving Commission authority for its direct billing procedure.

C. *Twelve Monthly Installments; Lump Sum Payment Option*

The allocated amounts of retroactive Order No. 94 payments will be billed customers directly, plus interest computed in accordance with the Commission's PGA regula-

tions, in equal monthly installments over a 12-month period beginning July 1, 1985 or such other date as established by the Commission in its order approving this procedure. Transco is proposing such monthly billing in order to ease the financial burden which would be caused by billing customers on a lump sum basis. Moreover, a court decision in the interim on the legality of Order No. 94 may effectively negate any further need for the procedure and subsequent payments thereunder. However, any customer which prefers to pay Transco is allocated share of these retroactive Order No. 94 amounts on a lump sum basis may choose to do so and thereby avoid the additional interest charges due as the result of Transco's proposed twelve monthly installment basis of payment.

D. *Showing Estimated Direct Billing By Customer; Adjustments Will Be Made to Reflect Actual Amounts*

Attached as Schedule A is an estimate of the total amount, excluding interest, Transco proposes to bill each of its customers in order to recover all amounts charged to the special subaccount at the time the direct billing procedure commences. Transco will credit this special subaccount monthly to reflect recovery of these amounts from its customers. As explained earlier, Transco has included in its direct billed amounts estimates of retroactive Order No. 94 amounts which it has been invoiced for but has not yet paid. To the extent Transco pays any amount which differs from the amount it has estimated, it will debit or credit the special subaccount by the amount which the actual payment differs from the estimate. At the end of the 12-month billing period, Transco will transfer any remaining balance or excess in this special subaccount to Account No. 191 and reflect this amount in its next PGA filing. In addition, Transco has reflected in its direct billing calculations approximately $18,900,000 of retroactive Order No. 94 amounts which

have been offset, pursuant to Commission Order No. 399-A, against amounts owed customers under Order No. 93. As previously noted, such offset procedure has been disallowed by order of the court but the court's decision may not be the final word on the subject.[*]

The amounts reflected on Schedule A necessarily are estimates, but Transco believes they are reasonably accurate. In any event, Transco intends to adjust such estimates for actual amounts, plus interest, and anticipates (a) that the actual amounts will not vary significantly from the estimates, and (b) that such actual amounts should be known prior to the completion of the twelve-month billing period. By way of further explanation, for retroactive Order No. 94 payments related to the years 1980, 1981 and 1982 it was necessary, for purposes of allocating these amounts to customers at this time, to estimate the production month in which these payments applied since only annual amounts are available without a detailed review of all producer invoices. For purposes of the estimates contained on Schedule A, Transco allocated each annual amount to the individual months based on total system purchases. While individual producer amounts thus estimated will vary (up and down) from the actual amounts which will be determined after the detailed review of all invoices, the aggregate amount and each customer's share) is not expected to vary from the estimated amounts to any significant de-

[*] Should the dispostion of the offset procedure for Btu measurement refunds remain unresolved as of the time Transco's direct billing procedure commences, Transco hereby agrees to reduce the balance in its special subaccount by the offset amounts, to reduce each customer's direct bill sums by each such customer's allocable share of these amounts, including interest, and to commence its direct billing procedure using such adjusted amounts. If the offset procedure ultimately is determined to be unlawful, Transco will increase the balance in its special subaccount and increase each customer's allocable share, including interest, utilizing the same procedures set forth herein.

gree. Such review of invoices is underway; substantial man-hours are involved in such undertaking.

Likewise, during the Commission-defined retroactive period July 25, 1980 through March 6, 1983, Transco paid certain gathering allowances which were in effect prior to the Commission approval of the generic allowances under Order No. 94. The allowances approved by the Commission pursuant to Order No. 94 replaced, retroactive to July 25, 1980, the allowances in existence prior to Order No. 94. Any payments made by Transco after March 6, 1983 did not include the full amount of charges related to the allowances approved under No. 94 in instances where other allowances in effect prior to Order No. 94 had already been paid by Transco. In these cases, the amount Transco actually paid retroactively was the difference between the allowance approved under Order No. 94 and the allowance in effect prior to Order No. 94. An analysis of representative months of the retroactive period reflects that approximately 91 percent of the total Order No. 94 amounts were actually paid on a retroactive basis. The remaining 9 percent were paid on a current basis via the allowances in effect prior to Order No. 94. Transco has utilized such estimated breakdown in calculating the direct billed amounts shown on Schedule A. Again, such amounts will be adjusted for actuals, plus interest, after the detailed review of invoices has been completed, and the final amounts are not expected to vary significantly from the estimated amounts.

At the time Transco completes the accounting review and adjusts its direct billing amounts to reflect actuals, those customers, if any, which opted for the lump-sum procedure will have the option to pay additional amounts, if any, on a lump-sum basis or to switch to a monthly basis, including interest, over the remaining months of the twelve-month billing period. Any reductions that may be due as a result of adjusting for actuals will be distributed to customers which opted for lump-sum billing

on a lump-sum basis, and to those customers which opted for monthly payments by reducing the remaining monthly billings by equal monthly amounts.

E. *Calculation of Interest on Payments and Credits*

The amounts which appear on Schedule A represent principal amounts only and therefore exclude any applicable interest. Transco will adjust the principal amounts to reflect interest to the date at which the billing procedure commences. Such interest on retroactive Order No. 94 payments will be calculated from the date of payment by Transco through the date the billing procedure commences. Inasmuch as Transco is proposing to give customers the option to pay these amounts over a 12-month period, additional interest will be calculated on these net amounts in order to determine each such customer's monthly payment. In addition, interest will also be calculated on amounts shown on Schedule B which will be refunded to each customer. As described earlier, these refunds result from the fact that certain retroactive Order No. 94 amounts have been included in PGA filings in Docket Nos. TA84-2-29-000 and TA85-1-29-000. Interest on these refund amounts will be calculated from the date when these amounts were paid by the customer through the date when the direct billing procedure commences. All such interest shall be calculated in accordance with the Commission's PGA regulations at the applicable interest rate in effect from time to time.

VI.

REASONS SUPPORTING DIRECT BILLING PROCEDURE

The direct billing procedure is the most logical and equitable method of assigning cost responsibility for this extraordinary, out-of-period item. These substantial retroactive payments relate to gas purchased by Transco from producers since mid-1980. Clearly, the matching

of such out-of-period costs to the customers' respective purchases, by month, during the period to which the costs are related is the most equitable method of allocating such costs. Thus, the proposed procedure will most clearly approximate the cost assignment that would have occurred had the payments been made at the same time as the gas purchases to which they relate. By the same token, collecting retroactive Order No. 94 payments through the regular PGA procedures would lead to a distortion of marketing signals because such costs relate to purchases made during prior periods.

Direct billing is supported not only by logic and equity, but also by precedent. Collecting these large retroactive Order No. 94 amounts through a pipeline's regular PGA mechanism is inconsistent with the Commission's treatment of other such out-of-period costs. Specifically, in Order No. 93, the Commission established a direct refund procedure for Btu measurement adustments wherein the pipeline's customers would be refunded these amounts based on their respective shares of purchases over the affected period. The Commission determined that flowing these large refund amounts through a pipeline's PGA could result in an inequitable distribution of refunds to the pipeline's customers. As the Commission explained in Order No. 399 issued September 20, 1984, the PGA mechanism is not appropriate for large out-of-period refunds (Mimeo, pp. 32-33):

> "The Commission believes that the use of the PGA mechanism to pass through the refunds could result in inequities. For example, customers which do not now purchase gas from an interstate pipeline would not receive a refund with a PGA pass-through, and it would be unfair if the customers actually overcharged did not receive a refund in the same proportion to their overcharges, given the magnitude and long-term nature of the overcharges.

In contrast, the Commission believes that the lump-sum mechanism is a fair and equitable procedure. Specifically, the lump-sum mechanism ensures that refunds will be made to those customers who over-paid the pipelines, and this mechanism will return the refunds to the ultimate consumer more quickly. Finally, the Commission recognizes that the Btu refund may temporarily disrupt the current gas market. But, the Commission believes that a lump-sum cash payment requirement will disrupt the current natural gas market less than the use of the PGA mechanism, since a lump-sum gas payment is made to those over-charged and does not adjust current prices."

Transco believes that retroactive Order No. 94 payments should be treated in a similar fashion, particularly in light of the fact that Transco has numerous customers on its system that currently are purchasing at much lower levels than they did during the period to which the retroactive Order No. 94 amounts apply. If Transco continued to flow these amounts through its PGA, such customers would be assessed substantially less than their equitable portion of the cost responsibility related to these amounts. Not only does direct billing result in the most equitable treatment of customers, it also effectively forecloses any and all allegations or concerns regarding potential manipulation of PGA filings for competitive or other purposes.

It should also be noted that the Commission has approved direct billing of Order No. 94 costs in *Natural Gas Pipeline Company of America*, Docket No. RP85-18-000, letter order issued January 29, 1985, and has pending before it in Docket No. RP83-8-000 a settlement proposal —supported by Commission Staff—which would establish direct billing for Tennessee Gas Pipeline Company, a competitor of Transco.

VII.

MISCELLANEOUS MATTERS

A. Transco wishes to make it abundantly clear that the instant proposal is not intended to—nor will it—circumscribe or restrict in any way interested parties' rights with respect to questioning the appropriateness of individual retroactive Order No. 94 payments. *See*, letter order issued January 29, 1985 in *Natural Gas Pipeline Company of America*, Docket No. RP85-18-000, *mimeo* at 2.

B. Transco is serving the instant petition on its customers, state commissions and other parties normally served with Transco's rate filings, and on those additional parties which have intervened in Transco's PGA filing in Docket No. TA85-3-29-000 which relates to the instant filing in the manner explained hereinabove. Transco submits that good cause exists for expedited consideration and, to that end, requests that an abbreviated intervention and comment period be established.

C. Transco requests that the Commission grant any waivers of its Regulations as may be required to make the direct billing procedure effective as proposed.

VIII.

CONCLUSION

For all of the foregoing reasons, Transcontinental Gas Pipe Line Corporation respectfully submits that the above-described proposed direct billing procedure is in the public interest and should be authorized as expeditiously as possible.

Respectfully submitted,

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

By /s/ Robert G. Hardy
Its Attorney

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

SCHEDULE A

TOTAL AMOUNT OF RETROACTIVE ORDER NO. 94 AMOUNTS TO BE INCLUDED IN PROPOSED DIRECT BILLING PROCEDURE

Rate Schedule	Customer	Total Retroactive Amounts 7/80-8/84
CD-1, PS-1, E-1	Atlanta Gas Light	$ 3,746,990.63
	United Cities, GA	305,039.27
	Total	$ 4,052,029.89
CD-2, PS-2, E-2	Carolina Pipeline	1,148,214.97
	Clinton-Newberry	244,356.19
	Columbia-Dranesville	576,254.60
	Commonwealth	3,462,946.37
	Danville	741,321.05
	Fort Hill	443,657.85
	Greenwood	352,906.52
	Laurens	218,533.72
	Lexington	342,136.18
	Lynchburg	438,135.18
	North Carolina Gas	370,153.65
	North Carolina Natural	5,219,044.03
	Piedmont	8,628,318.75
	Public Service of N.C.	5,956,928.22
	Shelby	477,508.30
	Washington Gas Light	3,769,022.30
	Total	$32,389,437.87
CD-3, PS-3, E-3 S-2	Brooklyn Union	10,467,032.67
	Columbia-Rockville	360,444.86
	Columbia-Downington	511,156.25
	Columbia-Muncy	570,630.38
	Consolidated Edison	17,983,883.88
	Delmarva	2,896,159.86
	Eastern Shore	1,056,760.22
	Elizabethtown	3,760,284.07
	Long Island Lighting	8,310,738.03
	National Fuel	866,463.97
	Pennsylvania Gas & Water	2,014,068.26
	Philadelphia Electric	5,837,284.24
	Philadelphia Gas Works	5,599,448.42
	Public Service E & G	20,362,432.34
	South Jersey	5,242,194.43
	Union Gas Company	538,467.72
	Total	$86,377,449.61

Rate Schedule	Customer	Total Retroactive Amounts 7/80-8/84
FI-2	Owens-Corning	240,110.47
G & OG 1, PS-1	Alexander City	115,236.47
	Bowman, GA	3,064.11
	Buford, GA	71,715.15
	Butler, AL	7,677.12
	Clanton, AL	32,951.62
	Commerce, AL	47,967.30
	Covington, GA	127,684.38
	East Central Alabama	48,751.35
	Elberton, GA	61,368.41
	Hartwell, GA	49,506.81
	Lawrenceville, GA	94,086.44
	Liberty, MS	7,011.12
	Linden, AL	77,360.33
	Madison, GA	15,338.66
	Maplesville, AL	6,293.11
	Monroe, GA	101,080.07
	Roanoke, AL	34,977.63
	Rockford, AL	1,977.06
	Royston, GA	19,801.31
	Social Circle, GA	20,131.85
	Sugar Hill, GA	17,454.23
	Thomaston, AL	1,693.51
	Toccoa, GA	99,044.93
	Tri-County Natural Gas	76,672.92
	Wadley, AL	3,874.27
	Wedowee, AL	5,758.20
	Winder	198,435.30
	Total	\$1,346,913.64
G & OG 2, PS-2	Bessemer City, N.C.	52,202.77
	Blacksburg, S.C.	27,419.10
	Fountain Inn, S.C.	40,537.27
	Greer, S.C.	211,678.36
	Kings Mountain, N.C.	122,558.36
	Southwestern Va. Gas	254,909.73
	Union, S.C.	182,884.98
	United Cities—S.C.	316,862.13
	Total	\$1,209,052.79

Rate Schedule	Customer	Total Retroactive Amounts 7/80-8/84
G & OG 3, PS-3	Columbia Gas (New Village)	127,695.48
	Fredrick Gas Co.	158,536.18
	U.G.I. Corporation	175,992.35
	Total	$462,224.01
ACQ-3	Consolidated Gas Supply	1,058,111.59
	North Penn	561,051.42
	Total ACQ-3	$1,619,163.01
X-20	Industrial Natural Gas	3,152.99
	Grand Total	$127,699,534.28

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

SCHEDULE B

PRINCIPAL AMOUNT OF PROPOSED REFUNDS TO CUSTOMERS RELATED TO TRANSCO'S PROPOSED DIRECT BILLING PROCEDURE FOR RETROACTIVE ORDER NO. 94 AMOUNTS

			Refund Related To Docket No. TA 85-1-29		
Rate Schedule	Customer	Refund Related To Docket No. TA 84-2-29 [1]	Regular Deferred Account [2]	4.5 Cents/DT Special Surcharge [3]	Amount Total
CD-1, PS-1, E-1	Atlanta Gas Light	$ 60,708.99	$ 725,972.48	$ 700,311.15	$ 1,486,992.62
	United Cities, GA	5,258.03	48,571.51	46,854.63	100,684.17
	TOTAL	$ 65,967.02	$ 774,543.99	$ 747,165.78	$ 1,587,676.79
CD-2, PS-2, E-2	Carolina Pipeline	$ 389.19	$ 50,791.95	$ 48,996.59	$ 100,177.73
	Clinton-Newberry	2,651.61	47,573.46	45,891.86	96,116.92
	Columbia-Dranesville	(0.42)	49,510.84	47,760.75	97,271.16
	Commonwealth	46,090.66	323,543.41	312,106.95	681,741.01
	Danville	11,183.14	135,554.54	130,763.03	277,500.70
	Fort Hill	7,218.74	75,410.13	72,744.57	155,373.44
	Greenwood	6,219.09	57,402.15	55,373.13	118,994.37
	Laurens	3,463.06	36,582.37	35,289.27	75,334.70
	Lexington	7,364.55	61,467.79	59,295.06	128,127.41
	Lynchburg	8,219.28	55,911.81	53,935.47	118,066.56
	North Carolina Gas	5,170.84	58,971.28	56,886.80	121,028.92
	North Carolina Natural	78,127.39	802,234.70	773,877.69	1,654,239.78
	Piedmont	152,148.71	1,160,172.12	1,119,162.92	2,431,483.75
	Public Service of N.C.	99,000.50	1,033,382.59	996,855.08	2,129,238.16

	Shelby	9,740.53	81,172.86	78,303.60	169,216.99
	Washington Gas Light	50,968.70	230,162.29	222,026.63	503,157.62
	TOTAL	$ 487,955.56	$ 4,259,844.29	$ 4,109,269.37	$ 8,857,069.22
CD-3, PS-3, E-3, S-2	Brooklyn Union	$ 81,349.37	$ 1,091,054.60	$ 1,052,488.53	$ 2,224,892.50
	Columbia-Rockville	199.03	30,406.61	29,331.81	59,937.44
	Columbia-Downington	8.05	22,792.10	21,986.46	44,786.61
	Columbia-Muncy	1,446.03	69,529.94	67,072.23	138,048.21
	Consolidated Edison	322,916.80	2,215,474.10	2,137,162.59	4,675,553.49
	Delmarva	55,263.94	402,838.69	388,599.35	846,701.98
	Eastern Shore	14,623.18	116,395.92	112,281.62	
	Elizabethtown	50,295.18	433,298.99	412,982.95	901,577.12
	Long Island Lighting	162,424.23	1,060,096.93	1,022,625.14	2,245,146.29
	National Fuel	9,658.71	91,045.68	87,827.45	188,531.84
	Pennsylvania Gas & Water	34,073.85	324,722.69	313,244.55	672,041.09
	Philadelphia Eléctric	43,138.66	1,041,661.93	1,004,841.77	2,089,642.35
	Philadelphia Gas Works	18,006.47	807,558.41	779,013.23	1,604,578.11
	Public Service E & G	235,397.87	1,488,800.91	1,436,175.50	3,160,374.28
	South Jersey	65,441.92	729,663.53	703,871.73	1,498,977.17
	Union Gas Company	7,007.70	63,307.77	61,070.00	131,385.47
	TOTAL	$1,101,250.97	$ 9,988,648.82	$ 9,635,574.87	$20,725,474.66
FI-2	Owens-Corning	3,811.80	22,376.18	21,585.24	47,773.22
G & OG 1, PS-1	Alexander City	1,370.04	22,012.93	21,234.83	44,617.80
	Bowman, GA	27.17	789.07	761.18	1,577.41
	Buford, GA	588.35	16,992.10	16,391.48	33,971.93
	Butler, AL	57.95	1,635.60	1,577.79	3,271.34
	Clanton, AL	314.48	7,172.27	6,918.75	14,405.51
	Commerce, AL	503.78	9,793.61	9,447.44	19,744.83

TRANSCONTINENTAL GAS PIPE LINE CORPORATION—Continued

Rate Schedule	Customer	Refund Related To Docket No. TA 84-2-29 [1]	Refund Related To Docket No. TA 85-1-29		
			Regular Deferred Account [2]	4.5 Cents/DT Special Surcharge [3]	Amount Total
	Covington, GA	1,917.26	27,892.56	26,906.63	56,716.45
	East Central Alabama	564.62	9,953.76	9,601.92	20,120.30
	Elberton, GA	629.80	12,520.52	12,077.96	25,228.28
	Hartwell, GA	679.94	10,448.38	10,079.06	21,207.37
	Lawrenceville, GA	821.19	24,440.40	23,576.49	48,838.08
	Liberty, MS	13.08	941.28	908.01	1,862.37
	Linden, AL	1,932.82	13,489.28	13,012.47	28,434.57
	Madison, GA	112.63	3,803.29	3,668.85	7,584.77
	Maplesville, AL	43.05	1,746.96	1,685.21	3,475.21
	Monroe, GA	1,396.31	19,916.52	19,212.53	40,525.36
	Roanoke, AL	676.63	7,472.32	7,208.19	15,357.13
	Rockford, AL	11.09	486.13	468.95	966.16
	Royston, GA	158.26	4,389.66	4,234.50	8,782.43
	Social Circle, GA	336.94	4,165.52	4,018.28	8,520.73
	Sugar Hill, GA	152.74	4,646.09	4,481.87	9,280.69
	Thomaston, AL	8.98	378.84	365.45	753.26
	Toccoa, GA	1,157.62	19,114.40	18,438.75	38,710.77
	Tri-County Natural Gas	1,354.16	14,020.57	13,524.98	28,899.70
	Wadley, AL	21.86	1,087.15	1,048.73	2,157.74
	Wedowee, AL	34.30	1,442.01	1,391.04	2,867.35
	Winder	4,111.47	32,299.39	31,157.69	67,568.55
	TOTAL	$ 18,996.51	$ 273,050.61	$ 263,398.95	$ 555,446.07

G & OG 2, PS-2	Bessemer City, N.C.	$ 711.66	$ 6,029.05	$ 5,815.94	$ 12,556.65
	Blacksburg, S.C.	474.65	5,516.05	5,321.07	11,311.77
	Fountain Inn, S.C.	583.23	7,152.54	6,899.72	14,635.48
	Greer, S.C.	4,375.29	33,128.06	31,957.07	69,460.42
	Kings Mountain, N.C.	1,702.19	20,753.78	20,020.19	42,476.16
	Southwestern Va. Gas	4,393.88	37,942.70	36,601.52	78,938.09
	Union, S.C.	3,109.71	32,995.72	31,829.40	67,934.82
	United Cities—S.C.	4,258.30	39,211.73	37,825.70	81,295.73
	TOTAL	$ 19,608.91	$ 182,729.62	$ 176,270.58	$ 378,609.11
G & OG 3, PS-3	Columbia Gas (New Village)	$ 2,666.34	$ 17,609.97	$ 16,987.50	$ 37,263.81
	Fredrick Gas Co.	2,409.36	16,148.13	15,577.34	34,134.83
	U.G.I. Corporation	2,359.34	32,558.57	31,407.71	66,325.62
	TOTAL	$ 7,435.05	$ 66,316.67	$ 63,972.54	$ 137,724.26
ACQ-3	Consolidated Gas Supply	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	North Penn	14,189.49	0.00	0.00	14,189.49
	TOTAL ACQ-3	$ 14,189.49	$ 0.00	$ 0.00	$ 14,189.49
	GRAND TOTAL	$1,719,215.32	$15,567,510.18	$15,017,237.33	$32,303,962.83

[1] Amounts collected from customers as a result of having included certain retroactive Order 94 amounts in Transco's regular PGA deferred account in Docket No. TA 84-2-29 (effective May 1, 1984).

[2] Amounts collected from customers as a result of having included certain retroactive Order 94 amounts in Transco's regular PGA deferred account in Docket No. TA 85-1-29 (effective November 1, 1984).

[3] Refunds related to Transco's 4.5 cents/DT special order No. 94 surcharge in Docket No. TA 85-1-29 effective November 1, 1984.

(7) (5)

No. 89-2001 and No. 90-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PIPELINE PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500
Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

(Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Texas Gas Transmission Corporation

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

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INTRODUCTION

The pipeline petitioners[1] hereby reply to the briefs in opposition filed by the Municipal Defense Group ("MDG") on July 25 and August 31, 1990, and by Columbia Gas Transmission Corporation, *et al.* ("Columbia") and Process Gas Consumers Group, *et al.* ("PGC") on August 31, 1990.

SUMMARY OF ARGUMENT

1. Respondents' briefs in opposition succeed only in showing that this case does indeed present a question worthy of this Court's review. First, respondents claim that the Court's decision late last term in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (June 21, 1990), forecloses the Commission from granting a waiver under Section 4(d) of the Natural Gas Act to permit a surcharge for gas sold in a past period, as it did here. But that is the precise question the Court expressly left open in *Arkansas Louisiana Gas Co.* v. *Hall* ("*Arkla* v. *Hall*"), 453 U.S. 571, 578 n.8 (1981). Whether *Maislin* intended to decide, *sub silentio*, the issue preserved for future consideration in footnote eight of the Court's opinion in *Arkla* v. *Hall* (as respondents claim) is itself surely a question worthy of this Court's plenary review. Second, respondents' own arguments demonstrate that the equitable allocation of large, past-period gas costs among pipeline customers is a serious and recurring problem in pipeline rate proceedings before the Federal Energy Regulatory Commission ("Commission"). The pervasiveness of this problem further reinforces the need for this Court to resolve the question of the Commission's statutory authority. Finally, by their own submissions, respondents would com-

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[1] The list of all parent companies and subsidiaries of the petitioners, as required by Rule 29.1 of the Court's Rules, was provided on p. iii of the petition for certiorari in No. 89-2001.

pletely upset the time-honored symmetry of the statute by making utilities responsible for refunding past-period *overcharges* to all customers while allowing select groups of customers to escape their fair share of responsibility for past-period *undercharges*. This perversion of the statutory purposes likewise warrants this Court's review.

2. Respondents' briefs in opposition contain several material inaccuracies of fact. We correct those herein.

3. Finally, respondents plainly are wrong in urging that the Court deny certiorari in this case regardless of any action it may take in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *petitions for cert. pending*, Nos. 89-1988, *et al.* ("*AGD-II*").

ARGUMENT

1. a. Both Columbia (Br. 21) and MDG (Br. 2 n.2, 8 n.7, 9, 22-23) argue that this case is controlled by the Court's recent decision in *Maislin Industries, supra.* We submit that this claim cannot withstand analysis, and that, in any event, respondents' own arguments demonstrate that this case presents an issue worthy of certiorari.

Reduced to its essentials, *Maislin*, like *Arkla* v. *Hall* and this Court's other "filed rate doctrine" cases, holds only that the terms of a private agreement for a regulated service, such as rail transportation, cannot, as a matter of law, supersede the filed rate. In *Maislin*, the Court held that this rule applied even when the regulatory body (in that case the Interstate Commerce Commission ("ICC")) declared in response to a referral from a federal trial court that the filed rate should *not* prevail. As the Court explained, the filed rate continued to have the force of law unless found to be "unreasonable" by the ICC, which did not occur. *Maislin*, slip op. 11-12 and n.10.

In contrast, this case concerns the *Commission's* authority, under the waiver provisions of Section 4(d) of

the Natural Gas Act, to approve a *change* in the filed rate, upon a proper filing by the regulated utility, permitting the utility to impose a surcharge for past undercollections that resulted from a Commission mandate to defer cost recovery. That is a question never before decided by this Court, and, indeed, expressly left open by Justice Marshall's opinion for the Court in *Arkla* v. *Hall*, 453 U.S. at 578 n.8. Columbia (Br. 18 and n.22) suggests that the cases appearing to recognize such a waiver power on the part of the Commission under Section 4(d) may have been implicitly overruled by *Maislin*. We disagree; but, in any event, respondents' submission by its own terms shows that this case raises a question worthy of certiorari.

There is absolutely no merit to the suggestion (Columbia Br. 3, 17-18; MDG Br. (No. 90-131) at 3) that this case is distinguishable from the situation envisioned by footnote eight in *Arkla* v. *Hall*, because of a purported lack of contractual agreement between the petitioner pipelines and their wholesale customers for payment by the customers of the costs at issue here. It is beyond dispute that the underlying service agreements between the pipelines and their customers, like the producer-pipeline contracts under which these costs originally were incurred, provide simply that the customer will pay the FERC-approved rate for gas, subject only to the customer's right to protest and seek a hearing concerning rate changes.

b. Columbia's theory of the case is that the "purchased gas adjustment" ("PGA") provisions found in many pipeline tariffs provide an effective and lawful method for recovering large amounts of deferred costs from past periods. *E.g.*, Columbia Br. 5 and n.7, Br. 10 and n.15, Br. 19. Thus, Columbia (Br. 10 n.15) notes that the Commission in one instance authorized one of the pipeline petitioners to collect some $170 million in unrecovered gas costs accured during a prior period by amortizing the total amount and collecting it in installments through its PGA account.

Again, Columbia's submission only reinforces our contention that this case does indeed warrant this Court's review. First, the instances cited by Columbia (and many others could be cited), in which gas purchase costs from past periods are passed through to pipeline customers in the current period, demonstrate that the problem presented here—*i.e.*, the deferred recovery of production-related costs under Section 110 of the Natural Gas Policy Act, 15 U.S.C. § 3320—is not an isolated or unusual situation, but rather a recurring problem, particularly during the massive restructuring now underway in the industry. The Commission's statutory authority to handle these situations in an equitable and lawful manner thus presents a question of very substantial practical importance.

Second, respondents, in attempting to discredit the direct billing methodology employed by the Commission in this case, prove too much. If the Commission is without power to impose the surcharge it attempted to impose in this case, as Columbia claims, then it is difficult to believe that the same costs would not be challenged if petitioners had employed a surcharge under the PGA mechanism. Indeed respondent MDG expressly challenges the use of the PGA for this purpose (MDG Reply Br. in *Columbia II* (filed August 22, 1989) at 5). Columbia (Br. 5 n.7) acknowledges that "the PGA mechanism for 'truing up' recovery of past gas costs is a departure from the normal process of setting fixed rates for the future based on estimates derived from historical experience," but suggests that the distinction lies in the fact that "the PGA mechanism itself is on file as part of the pipeline's tariffs." But that is no distinction at all, because the petitioner pipelines likewise proposed their direct billing plans by means of Section 4 rate filings; the Commission designated the charge as a "rate" and permitted it to become effective. *E.g.*, Pet. App. (No. 89-2001) 72a.

c. Respondents also claim that the direct billing mechanism approved by the Commission in this case promotes an "asymmetrical outcome" (Columbia Br. 17) by per-

mitting retroactive rate increases which undermine the "consumer protection" purposes of the Natural Gas Act (Columbia Br. 16-17; MDG Br. (No. 89-2001) 26-27; MDG Br. (No. 90-131) 12, 14, 16; PGC Br. 4-5). In truth, however, it is respondents' position that results in a perversion of the statutory purposes.

Under the respondents' view of the law (as adopted by the court of appeals in this case), if a pipeline *overcollects* its costs in one period, it has an absolute obligation to refund those amounts at the earliest possible moment, to assure that the refunds reach those consumers whose payments proved to be too high. Yet, if during the same period the pipeline *undercollects* its gas costs—either because of a flawed projection (as often happens in PGA proceedings) or (as here) because the Commission had not yet permitted the pipelines to include certain costs in their then-current charges—the respondents would allow the customer to avoid meeting its cost responsibility by simply cutting back on its current purchases, which would shift the same costs to other customers. The Natural Gas Act obviously was not enacted in order to enable one subgroup of consumers to benefit at the expense of others in this manner.[2]

2.a. Columbia is fundamentally wrong, as a factual matter, in its repeated references to "delay" by the petitioner pipelines in seeking to recover the Section 110 costs authorized under Order No. 94-A (Br. 6, 7, 20 n.25), and in its related suggestion (*id.* at 8 n.12) that the pipelines were dilatory in not filing their direct billing proposals until some two years after the moratorium

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[2] The amounts at issue have long since been collected by the pipelines from their customers, including respondents. What respondents seek is to recover their payments and impose their share of the costs on the pipelines' other customer or on the pipelines themselves. None of the respondents has ever taken issue with the Commission's conclusion that the direct billing methodology is the most equitable way of allocating these costs among pipeline customers.

on cost recovery was lifted in 1983. In fact, as the respondents are well aware, the Commission and the industry throughout this period were intensively engaged in developing an appropriate, equitable means of permitting the pipelines to pass through to their customers the Section 110 costs at issue here.

First, Order No. 94-A, while lifting the moratorium as of January 1983, specifically permitted first sellers to collect the retroactive production-related costs from the pipelines "over a time period commencing with the date this order becomes effective and ending December 31, 1984." Order No. 94-A, FERC Stats. & Regs., Regs. Preambles (CCH) ("Regs. Preambles") ¶ 30,419 at 30,368 (1983). Consequently, many pipelines were precluded from filing to recover all the relevant costs until late 1984 or early 1985 at the earliest, even when they were promptly billed by their producer-suppliers (which often was not the case). *See* 18 C.F.R. § 154.63(e)(2).

Moreover, in order to minimize the impact of the pass-through of these production-related costs, the pipelines proposed and the Commission ultimately approved an alternative mechanism that would synchronize pipeline obligations to first sellers under Order No. 94-A with first seller refund obligations to the pipelines for essentially the same sales of gas. Specifically, this plan permitted the pipelines to offset their Section 110 costs payable to producers against the amounts the same producers owed the pipelines in refunds—due to overcollections from a separate Commission regulation that the D.C. Circuit had invalidated in 1983 in *Interstate Natural Gas Ass'n, Inc. v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984). On November 20, 1984, the Commission approved this offset mechanism. Order No. 399-A, 49 Fed. Reg. 46,353 (1984). But, on March 5, 1985, a split panel of the D.C. Circuit (over a dissent by then-Judge Scalia) declared it invalid, on the ground that the pipelines' customers should get the refunds due from the producers immediately, without waiting to resolve issues concerning the amounts owed to the producers by the

pipelines. *Interstate Natural Gas Ass'n, Inc.* v. *FERC*, 756 F.2d 166 (D.C. Cir.), *cert. denied*, 474 U.S. 847 (1985).[3]

Thus, it was only shortly after the D.C. Circuit invalidated the offset plan in March 1985—and while the pipelines' challenge to the Commission's Section 110 rules was still pending before the Fifth Circuit[4]—that petitioner Transcontinental Gas Pipe Line Corporation, on May 22, 1985, filed the first of the pipeline direct billing proposals with the Commission. *See* Pet. App. (No. 89-2001) 60a; Columbia App. 1a-25a. The other pipelines filed their respective plans shortly thereafter. There was no "delay" on the part of the pipelines in this case. Moreover, in light of this history, in which all pipelines and their customers were involved, it is astonishing for respondents now to argue that they were unaware of their potential liabilities.

b. Equally inaccurate is Columbia's suggestion (Br. 20, 23) that the recent Commission-driven restructuring of the natural gas pipeline industry postdated the pipelines' direct billing proposals and thus has no connection with this case. In fact, the most critical event that allowed Columbia and its fellow respondents to cut back or discontinue gas purchases from their traditional pipeline suppliers was Commission Order No. 380,[5] issued in June 1984, at the heart of the events in this case. Order No. 380 invalidated longstanding minimum purchase agreements in contracts between interstate pipe-

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[3] Ironically, were it not for that action by the D.C. Circuit, the "retroactivity" that the court condemned in the instant case simply would not have occurred.

[4] It was not until August 19, 1985, that the Fifth Circuit issued its opinion in *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (1985), *cert. denied*, 476 U.S. 1114 (1986), affirming the Commission's orders requiring retroactive payment of Section 110 costs by the pipelines to producers.

[5] Order No. 380, 49 Fed. Reg. 22,778 (1984), *aff'd sub nom. Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

lines and their wholesale customers.[6] It was this dramatic, Commission-imposed seachange in pipeline gas sales markets that made it infeasible for the pipeline petitioners to attempt to recover Section 110 gas costs through the normal PGA process. In 1985, in Order No. 436,[7] the Commission, in effect, dropped the other shoe by mandating that the interstate pipelines become "open-access" transporters. Thus, Columbia's attempt to dissociate this case from the backdrop of industry restructuring must fail.

c. MDG also errs in its assertion (MDG Br. 21-22, 23) that the Fifth Circuit's *Texas Eastern* decision, which approved the retroactive billing of production-related costs by first sellers to their purchasers, did not arise under Section 4 of the Natural Gas Act, as this case does, but rather arose solely under Section 110 of the NGPA. MDG miscontrues this admittedly complex statutory scheme, which involves both the Natural Gas Act and the NGPA working in tandem.[8] As the Commission clearly articulated in the Order No. 94 series, Section 110 applies to *all* of the price categories set out in Title I of the NGPA, including those categories that remain subject to the Commission's Natural Gas Act

[6] The profound impact of Order No. 380 on pipeline sales is graphically illustrated in Table 3 of Commission Order No. 500-H, Regs. Preambles ¶ 30,867 at 31,520 (1989), *aff'd sub nom. American Gas Ass'n* v. *FERC*, Nos. 87-1588, *et al.* (D.C. Cir. August 24, 1990), which shows that gas sales by the interstate pipelines began to fall off precipitously, and that consequent pipeline exposure to producer claims for "take-or-pay" liability began to increase, immediately after issuance of Order No. 380 in 1984.

[7] Order No. 436, 50 Fed. Reg. 42,408 (1985), *aff'd in part and vacated sub nom. Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[8] Thus, for example, Order No. 94 expressly permitted sellers of NGA-regulated gas "to apply for, and receive, production-related costs in addition to the Natural Gas Act allowances." Regs. Preambles ¶ 30,178 at 31,211 (1980); *see also id.* at 31,213, 31,214 and 31,216. *Accord, Phillips Petroleum Co.*, 12 FERC ¶ 61,080 (1980).

jurisdiction. Thus, the Fifth Circuit's holding in *Texas Eastern*, 769 F.2d at 1066, that the retroactive collection of Section 110 costs "was a fair balancing of the various problems involved" which did not constitute invalid retroactive ratemaking, necessarily *did* encompass, in part, producer sales that remained subject to Section 4 of the Natural Gas Act.[9] Accordingly, contrary to MDG's view, *Texas Eastern* is directly in conflict with the D.C. Circuit's decisions in the instant case.

3. Finally, we note that both Columbia and MDG take an unduly narrow view of the case when they assert (Columbia Br. 22-23; MDG Br. (No. 90-131) 17-18) that the issue presented here is distinct from that in *AGD-II*, *supra*, and therefore that the Court should deny the petition for certiorari here even if it grants the petition in *AGD-II*. In fact, the two cases are plainly related. Both concern the Commission's authority to authorize a surcharge premised upon a customer's purchases during a past period. Both cases arise in the midst of—and directly because of—a massive restructuring in the industry, which would cause grave inequities among different groups of ratepayers if the normal pass-through mechanisms were employed. In both cases, moreover, the D.C. Circuit adopted essentially the same restrictive view of the Commission's ratemaking powers under Section 4 of the Natural Gas Act. The only difference is that in this case the Commission grounded its decision in the waiver provisions of Section 4(d). But

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[9] *Accord*, *Mobil Exploration and Producing North America, Inc.* v. *FERC*, 881 F.2d 193, 197 (5th Cir. 1989) ("Problems of retroactivity [in cases arising under Section 4] are resolved on the basis of balancing considerations of fairness and the necessities of practical administration.") (citations omitted); *id.* at 198 ("Although the successor's sales made prior to receiving a successor's certificate are in technical violation of the NGA and the filed rate doctrine, FERC can properly exercise its equitable powers to make the successor filing relate back to the time of transfer.") (*citing Plaquemines Oil & Gas Co.* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971)).

that is a distinction which, if anything, militates in favor of the Court's granting plenary review in this case, rather than merely holding it in abeyance pending the outcome of *AGD-II*. It certainly does not suggest a basis for denying certiorari here.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should grant the petitions for certiorari in No. 89-2001 and in No. 90-131.

Respectfully submitted,

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

Attorneys for Texas Gas Transmission Corporation

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

Attorneys for Transcontinental Gas Pipe Line Corporation

September 6, 1990

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No. 90-131

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION,
PETITIONER

v.

COLUMBIA GAS TRANSMISSION CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

JOHN G. ROBERTS, JR.
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM S. SCHERMAN
General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-131

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

COLUMBIA GAS TRANSMISSION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

The brief in opposition filed by respondents Columbia Gas Transmission Corporation, et al., is devoted almost entirely to the submission that the Court should not grant plenary review in this case. See Columbia Br. in Opp. 14-21. However, we do not urge the Court to grant plenary review, on the basis of either our own petition or the petition filed by the affected pipelines, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990). Instead, we suggest that both petitions be held and disposed of in light of the

Court's disposition of *FERC* v. *Associated Gas Distributors,* petition for cert. pending, No. 89-2016 (filed June 22, 1990) (*AGD II*), and the other certiorari petitions seeking review of the decision of the D.C. Circuit in that case (see Pet. 13 n.8). Respondents have offered no persuasive reason for rejecting our modest suggestion.

1. This case involves the validity of Commission orders permitting five natural gas pipelines to pass through to downstream customers, based on their past purchases of gas, various costs that the pipelines themselves had been required to pay producers for their purchase of the same gas. The Commission found "good cause" for waiving the notice requirement in Section 4(d) of the Natural Gas Act (NGA) in order to permit the pipelines to place the rate increases in effect as of 1980, when the Commission had imposed an interim moratorium on the filing of applications to recover the costs.

In setting aside the Commission's orders, the D.C. Circuit did not hold that Section 4(d) of the NGA absolutely bars the Commission from granting a waiver that permits a rate increase to be given an effective date prior to when it was filed with the Commission. To the contrary, the court below acknowledged that it had sustained a waiver having that effect in a prior case, Pet. App. 10a-11a (citing *City of Piqua* v. *FERC*, 610 F.2d 950, 954-955 (D.C. Cir. 1979)),[1] and other courts of appeals likewise have held that Section 4(d) permits the Commission to grant such a waiver. *Hall* v. *FERC*, 691 F.2d 1184 (5th Cir. 1982), cert. denied, 464 U.S. 822 (1983); *Towns of Concord & Wellesley* v. *FERC*,

[1] "Pet. App." refers to the petition for a writ of certiorari in No. 89-2001.

844 F.2d 891, 896-897 (1st Cir. 1988). Because the court below did not reject the Commission's interpretation that Section 4(d)'s waiver provision allows a pre-filing effective date, and because there is in any event no circuit conflict on that issue, we do not believe that it warrants review. Although respondents question (Columbia Br. in Opp. 18 & n.22) the continuing validity of *City of Piqua*, *Hall*, and *Towns of Concord & Wellesley* after *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), they likewise do not ask the Court to grant review on the scope of Section 4(d)'s waiver provision in this regard.[2]

2. As we have explained (Pet. 16-18), the court of appeals' decision in this case rested on a different ground. It faulted the Commission for failing to notify the pipelines' downstream customers in 1980 that they might later be billed an additional amount to cover costs of producing the gas they were purchasing. See Pet. App. 10a-11a, 13a. The court of appeals made clear that this notice was distinct from the "statutory notice" required by (and subject to waiver under) Section 4(d) of the NGA. Pet. App. 10a. Contrary to the court's view, however, the

[2] We do not believe that *Maislin* has any bearing on the scope of the Commission's waiver authority in this case, since the Court specifically declined to express a view on the Interstate Commerce Commission's actions under the corresponding provision of the Interstate Commerce Act, 49 U.S.C. 10762(c), which is worded differently from Section 4(d) of the NGA. See 110 S. Ct. at 2770 n.14. The effect, if any, of *Maislin* on the Commission's waiver authority under Section 4(d) of the NGA may be considered by the D.C. Circuit if, as we urge, the Court vacates the judgment below and remands the case for further consideration in light of its ultimate disposition in *AGD II*.

NGA's prohibition against retroactive rate increases instituted by a pipeline derives from Section 4(d).[3] In holding that the prohibition instead exists independently of Section 4(d), and then fashioning an extra-statutory notice requirement to enforce this unanchored prohibition, see Pet. 17-18; Pet. App. 10a, 11a, 13a, the court adhered to the approach it followed in *AGD II*, where it likewise invoked a judicially fashioned version of the filed rate doctrine that is not rooted in the text of the NGA. See 89-2016 Pet. 13-15, 18-19, 21-25; 89-2016 Reply Br. 4-8. It is for this reason that we suggest the Court hold the petitions in this case pending the disposition of *AGD II*.

Respondents' objections to our suggestion are insubstantial. First, they argue (Columbia Br. in Opp. 22) that *AGD II* is distinguishable because it does not involve the Commission's waiver authority under Section 4(d). But as we have just explained, the court below did not hold that Section 4(d) itself bars the Commission from granting a waiver that permits a rate increase to be given a pre-filing effective date; the court instead invalidated the rate increase because the Commission did not comply with notice requirements that the court found to exist independently of Section 4(d) and that therefore were unaffected by a waiver under Section 4(d).

Second, respondents assert (Columbia Br. in Opp. 23) that there is no "reason to expect that any fore-

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[3] Contrary to respondents' suggestion (Mun. Def. Grp. Br. in Opp. 9), this Court distinguished between Sections 4(d) and 5(a) of the NGA in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577-578 (1981), and it specifically reserved the question whether the Commission could grant a waiver under Section 4(d) to permit a pre-filing effective date in the circumstances of that case, 453 at 578 n.8.

seeable disposition by the Court of [the] petitions [in *AGD II*] would affect the holding of the court of appeals in this case." But as we explain in the petition (at 19), if the Court grants certiorari in *AGD II* and reverses the D.C. Circuit's decision in that case because it was not based on the text of the provisions of the NGA (including Section 4(d)) that comprise the filed rate doctrine—and if the Court then remands this case for further consideration in light of *AGD II*—it will be clear to the D.C. Circuit that the NGA's only prohibition against retroactive rate increases instituted by a pipeline is contained in Section 4(d). Under its own precedent in *City of Piqua*, which construed Section 4(d)'s waiver provision to permit a rate increase having a pre-filing effective date, the D.C. Circuit would be required to consider on remand whether the Commission reasonably determined that there was "good cause" for permitting a pre-filing effective date in this case. There is no reason to assume that the court would disagree with that determination, in view of the Commission's statement when it imposed the moratorium in 1980 that producers would be permitted to recover the costs from pipelines on a retroactive basis, the changes in the natural gas industry since that time, and the fact that the costs were incurred by producers and paid by pipelines for the benefit of downstream customers such as respondents. See also Pet. 10, quoting Pet. App. 13a (Commission "may well be correct in its assessment of the equities").

Third, respondents erroneously contend (Columbia Br. in Opp. 20, 23) that this case is unrelated to *AGD II* because it does not arise out of the massive restructuring of the natural gas industry in the 1980s. Although respondents are correct that the

Commission's original orders allowing the pipelines to recover the costs by direct billing of downstream customers preceded the Commission's Order No. 436,[4] which was designed to encourage pipelines to assume open-access status, the pipeline petitioners correctly point out (89-2001 Reply Br. 7-8) that those orders came *after* Order No. 380,[5] which eliminated variable-cost minimum bills in pipeline tariffs and was the first major step in restructuring the natural gas market. See 89-2016 Pet. 6. And of course the waiver orders in this case were issued by the Commission in 1988, Pet. App. 15a, well after Order No. 436. Thus, the orders in this case and in *AGD II* arose out of the same regulatory and market climate.[6]

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition

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[4] FERC Stats. & Regs., Regulations Preambles [1982-1985] ¶ 30,665 (Oct. 18, 1985).

[5] FERC Stats. & Regs., Regulations Preambles [1982-1985] ¶ 30,571 (June 1, 1984), aff'd *sub nom. Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986).

[6] The basis for holding the petitions in this case pending the disposition of *AGD II*, rather than denying certiorari, is reinforced by the recurring nature of the issue. In *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 580 n.7 (1990), the D.C. Circuit relied on its decision in the instant case in holding that the Commission could not allow certain charges by waiving the notice requirement in Section 4(d). On August 29, 1990, we filed a petition for a writ of certiorari in the *Transwestern* case, suggesting that the petition be held and disposed of in light of the Court's disposition of the petitions in *AGD II* and the instant case. *FERC* v. *Public Utilities Comm'n of California*, No. 90-367. The affected pipelines also have filed a certiorari petition in that case. *Transwestern Pipeline Co.* v. *Kansas Power & Light Co.*, No. 90-344 (filed Aug. 24, 1990).

for a writ of certiorari (and the petition filed by the pipelines in this case, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990)) should be held and disposed of as appropriate in light of the Court's disposition of the petition for a writ of certiorari in *FERC* v. *Associated Gas Distributors*, No. 89-2016 (filed June 22, 1990), and the other certiorari petitions seeking review of the judgment of the District of Columbia Circuit in that case.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

WILLIAM S. SCHERMAN
General Counsel
Federal Energy Regulatory Commission

SEPTEMBER 1990

* The Solicitor General is disqualified in this case.

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No. 89-2001 and No. 90-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

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Petitioners,
v.

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Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in these cases. Petitioners have consented to INGAA's filing of this brief. The consent of the respondents was requested but refused.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States.

The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

REASONS FOR GRANTING THE MOTION

These cases involve orders of the Commission which permitted natural gas pipelines to direct bill their customers for certain production costs that the Commission had previously required the pipelines to pay producers for past sales of gas. The United States Court of Appeals for the District of Columbia Circuit held that notwithstanding the Commission's finding of "good cause" for waiving the notice requirement in Section 4(d) of the NGA, the direct billing by the pipelines of such costs constituted retroactive ratemaking in violation of the filed rate doctrine.

The issue in these cases is therefore similar to the issues presented in *FERC* v. *Associated Gas Distributors*, *petition for cert. pending*, No. 89-2016 (filed June 21, 1990), in which the Commission has sought review of another D.C. Circuit opinion which held that a Commission order authorizing a pipeline's recovery of take-or-pay costs using the purchase deficiency methodology prescribed in Order No. 500 violated the filed rate doctrine by permitting retroactive ratemaking. *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"). INGAA has filed a motion for leave to file *amicus curiae* in support of the Commission's petition for writ of certiorari in that case.

The costs at issue herein are substantial. They total approximately $1.5 billion for the industry, and approximately $500 million with respect to the five pipelines—all of which are INGAA members—which sought to direct bill their costs and for which direct billing was authorized by the Commission. The court of appeals' decision, if affirmed, will constitute yet another impediment to the transition of pipelines from their former role primarily as gas merchants to a new role in which they are predominantly gas transporters. This necessary transition cannot be completed unless and until pipelines have put behind them the disputes and resulting costs of restructuring their gas purchase arrangements.

Over and above the impact of the court of appeals' decision on the ability of pipelines to recover their costs in a manner consistent with current competitive markets, the decision represents an unjustified extension of the filed rate doctrine, a misinterpretation of the rule against retroactive ratemaking, and a failure to accord proper deference to the Commission's ratemaking expertise.

INGAA, as representative of the interstate natural gas pipeline industry which is directly affected by the court of appeals' decision, has a unique perspective and interest which will aid this Court in its consideration of the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA respectfully requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record

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BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Cana-

dian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

SUMMARY OF ARGUMENT

This case presents another in a series of recent decisions by the United States Court of Appeals for the District of Columbia Circuit relying on the "filed rate doctrine" to usurp the authority of the Commission to establish just and reasonable rates. *See Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016); *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344). The extended procedural history of the decision below graphically illustrates the seriously adverse effects of the D.C. Circuit's rulings in this area. As will be explained in this Brief, the D.C. Circuit has adopted a novel, and legally unsupportable, interpretation of the filed rate doctrine with which to reject the Commission's determination that certain purchased gas costs incurred by pipelines may not be recovered by means of a direct bill. Contrary to the lower court's decision, the rates at issue in this case neither violate the filed rate doctrine nor authorize unlawful retroactive collection. These rates were properly filed with the Commission and were found by the Commission to be just and reasonable when they were put into effect.

Because this case presents issues similar to those raised by the Commission in its petition for writ of certiorari in *AGD II*, INGAA recommends that certiorari be granted in the instant cases.

ARGUMENT

This case graphically illustrates the seriously adverse and inequitable effects of the D.C. Circuit's restatement of the filed rate doctrine. In 1978, the Commission issued interim regulations allowing producers to apply on an individual basis for recovery of production-related costs. 43 Fed. Reg. 56,448; 56,575-56,577 (1978). Two years later, the Commission decided to defer any assessment of such costs until completion of a "generic," industry-wide proceeding but stated that its final rule would authorize recovery of the costs for the period required to complete the rulemaking. *See* Order No. 94, 45 Fed. Reg. 53,099 (1980), FERC Stats. & Regs. [Regulations Preambles 1977-81] ¶ 30,178 (1980). A final rule was not issued until 1983. Order No. 94-A, 48 Fed. Reg. 5152 (1983), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,419 (1983). The Fifth Circuit subsequently affirmed Order No. 94-A and specifically approved the collection of production-related costs within the guidelines provided by Order No. 94-A. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

The protracted proceedings engaged in by the Commission and the generous allowances provided by its final rule resulted in the payment of extremely large lump sum costs. Given this background, and the enormous pressure being imposed on pipeline rates by the general industry restructuring then underway, the Commission authorized collection of these costs by means of a direct bill. The D.C. Circuit rejected these orders in *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988)

("*Columbia I*"). The court held that such direct billing constituted retroactive ratemaking in violation of the filed rate doctrine because "downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased." 831 F.2d at 1140. In so holding, the court stated that the purpose of the filed rate doctrine is to maintain "predictability" in the rates that will be charged and concluded that the challenged orders provided no such predictability for the pipelines' downstream customers. 831 F.2d at 1141 (*citing Electrical District No. 1* v. *FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985)).

On remand, the Commission concluded that direct billing of production-related costs covered by Order No. 94-A was warranted "in the context of the overriding public interest in the orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which will thereby result." *Transcontinental Gas Pipe Line Corporation*, 45 FERC ¶ 61,169 at 61,487 (1988). In doing so, the Commission concluded that, in light of the dramatic changes in natural gas markets which had occurred during the protracted proceedings involving Order Nos. 94 and 94-A (in particular the Commission's efforts to restructure natural gas markets based on competitive market principles), a direct billing cost recovery mechanism was needed to achieve an equitable allocation of costs without unduly disturbing market signals to pipeline customers. *Id.* at 61,486-61,487. Notwithstanding the Commission's clear affirmation that a direct billing mechanism was necessary to achieve equity and the goal of allowing natural gas prices to be set by competitive market forces, the D.C. Circuit again set aside the Commission's order. *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131).

INGAA urges the Court to put an end to the regulatory stalemate engendered by the D.C. Circuit's action in this and other cases. In this instance, interstate pipelines have endured a ten-year wait—first for clarification of their obligations to pay and now for authorization to collect the costs arising from Order No. 94. The D.C. Circuit has never suggested that the production-related costs at issue are not proper costs for passthrough to pipeline customers. Instead, it has made passthrough a practical impossibility and has thereby thwarted the Commission's regulatory reform efforts. Simultaneously, it has effectively penalized the interstate pipelines involved in this case (in an amount in excess of $500 million in production-related costs incurred by them) for acting in reliance on the Fifth Circuit's decision that collection of production-related costs was properly authorized. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d at 1066.

Interstate pipelines subject to the Commission's jurisdiction are statutorily entitled to a reasonable opportunity to recover their prudently incured costs. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The Order No. 94 costs at issue herein were found by the Fifth Circuit in *Texas Eastern* to be owing to the producers pursuant to Section 110 of the NGPA, 15 U.S.C. § 3320 (1988). Such costs accordingly are entitled to be treated as prudently incurred costs, and thus pipelines must be afforded a reasonable opportunity to recover them. Indeed, Section 601(c) of the NGPA, 15 U.S.C. § 3431(c) (1988), guarantees that, absent fraud, abuse, or similar grounds, pipelines may pass through any amounts paid with respect to any purchase of natural gas, including costs such as production-related costs covered by Section 110. Therefore, neither the Commission nor any court has authority to preclude pipeline recovery of these costs.

Only this Court can put an end to the lower court's serious misapplication of the governing statutory provisions. The appellate courts and the Commission must be

given clear guidance so that regulated interstate pipelines can know the rules under which they must operate and thus do business with reasonable assurance that the current regulatory uncertainty will be terminated.

In this regard, it is important for the Court to note that the D.C. Circuit's decision in this case is only one of a series of decisions grounded in its peculiar interpretation of the relationship between the filed rate doctrine and the retroactive ratemaking doctrine. The D.C. Circuit has recently applied the reasoning adopted in *Columbia I* as its basis for holding in *AGD II* that the Commission's purchase deficiency method of allocating take-or-pay costs violated the filed rate doctrine. *AGD II*, 893 F.2d at 355-356. INGAA has filed a motion for leave to file a brief *amicus curiae* in support of petitioner, the Commission, in that proceeding. *FERC* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-2016 (filed June 21, 1990). Similarly, in *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344), the D.C. Circuit has relied on its view of the filed rate doctrine to prohibit a pipeline from relying on direct billing to recover certain amounts in its purchased gas adjustment account. *Id.* at 577 (*citing Columbia I* and *Electrical District No. 1, supra*).

INGAA submits that certiorari should be granted in this proceeding for the same reasons set forth in INGAA's brief *amicus curiae* in *AGD II*; that is, the D.C. Circuit has incorrectly and unjustifiably expanded the filed rate doctrine and the rule against retroactive ratemaking and has thereby improperly limited the Commission's ratemaking authority by substituting its judgment for that of the Commission. As noted by the Commission and the pipelines in their respective petitions for certiorari herein, the D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II*. Fur-

thermore, as explained by the Commission, in practical terms, both cases are related since they both involve the allocation of costs by pipelines in the wake of an industry restructuring to promote competitive market conditions.

It is clear that pipelines are entitled to a reasonable opportunity to recover prudently incurred costs and to guaranteed passthrough of gas purchase costs pursuant to the provisions of NGPA Section 601(c).[1] Not only will the D.C. Circuit's decision affect recovery of costs, it will also have the predictable effect of prolonging regulatory uncertainty and thus will exacerbate the disruption attendant on the Commission's massive restructuring of the industry.

INGAA supports the Commission's assertion that the Supreme Court's disposition of *AGD II* will shed considerable light on the appropriate disposition of this case. Nevertheless, there are material differences in the facts underlying each case. Accordingly, INGAA submits that each case should be addressed on the merits individually, applying the Court's ruling on the proper application of the filed rate doctrine and the retroactive ratemaking doctrine to each case, as appropriate.

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[1] To the extent that recovery of costs is limited to adding such costs to the pipelines' commodity rates, the D.C. Circuit has conceded that the result is tantamount to a denial of cost recovery. *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 1025-1026 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) ("*AGD I*").

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

Respectfully submitted,

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200

Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record